INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING CERTAIN PROPERTY

(LIECHTENSTEIN *v.* GERMANY)

VOLUME II

Preliminary Objections of Germany;
Written Observations of Liechtenstein; Verbatim Records of the Hearings

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AFFAIRE RELATIVE À CERTAINS BIENS

(LIECHTENSTEIN *c.* ALLEMAGNE)

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Exceptions préliminaires de l'Allemagne;
observations écrites du Liechtenstein; comptes rendus d'audience

Abbreviated reference:

I.C.J. Pleadings, Certain Property (Liechtenstein v. *Germany)*, Vol. II

Référence abrégée:

C.I.J. Mémoires, Certains biens (Liechtenstein c. Allemagne), vol. II

ISSN 0074-4433
ISBN 978-92-1-071061-9

Sales number
N° de vente: **952**

CASE CONCERNING CERTAIN PROPERTY
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IMPRIMÉ EN FRANCE
PRINTED IN FRANCE

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This case, entered on the Court's General List on 1 June 2001 under number 123, was the subject of a Judgment delivered on 10 February 2005 (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6).

The documents relating to the case are being published in the following order:

Volume I. Application; Memorial of Liechtenstein.
Volume II. Preliminary Objections of Germany; Written Observations of Liechtenstein; Verbatim Records of the Hearings.

*

For the purposes of this edition, the Court has decided that the written pleadings will be reproduced *in full*; it will therefore also include the documents annexed to those pleadings, which are not made available on the Court's website. The reproduction of all the annexed documents in this edition will enable practitioners to appreciate better the full scope of the arguments developed by the Parties in their written pleadings. As usual, the verbatim records of the public hearings appear after the pleadings; these verbatim records are published here in their final corrected versions, providing a useful supplement to the provisional versions made available on the Court's website.

Since the Court wishes to publish these documents as quickly as possible, it has been decided, where technically feasible, to reproduce the pleadings in the form in which they were submitted by the Parties.

Some documents in this edition have thus been scanned, and there are consequently two types of page numbering for the items included in these volumes: in addition to the normal continuous pagination, the original page numbers of the scanned documents are provided in brackets for reference purposes.

The Hague, 2009.

La présente affaire, inscrite au rôle général de la Cour sous le numéro 123 le 1er juin 2001, a fait l'objet d'un arrêt rendu le 10 février 2005 (*Certains biens (Liechtenstein c. Allemagne), exceptions préliminaires, arrêt, C.I.J. Recueil 2005*, p. 6).

Les documents relatifs à cette affaire sont publiés dans l'ordre suivant :

Volume I. Requête ; mémoire du Liechtenstein.
Volume II. Exceptions préliminaires de l'Allemagne ; observations écrites du Liechtenstein ; comptes rendus d'audience.

*

Aux fins de la présente édition, la Cour a décidé que les pièces de la procédure écrite seront reproduites *intégralement* ; cette édition comprendra donc aussi les documents annexés auxdites pièces — qui ne sont pas mis en ligne sur le site Internet de la Cour. La reproduction de l'ensemble des documents annexés dans cette édition permettra aux praticiens de mieux apprécier, dans toute sa portée, l'argumentation développée par les parties dans leurs écritures. Comme à l'accoutumée, les comptes rendus des audiences publiques sont publiés à la suite des pièces de procédure écrite ; ces comptes rendus apparaissent ci-après dans leur version finale corrigée — qui complète ainsi utilement la version provisoire mise en ligne sur le site de la Cour.

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Ainsi, certaines pièces de la présente édition ont été scannées et, de ce fait, les titres courants du présent ouvrage comportent deux genres de folios : outre la pagination continue habituelle, on trouvera, entre crochets, la pagination d'origine des pièces scannées, à laquelle il faudra se reporter en cas de renvoi.

La Haye, 2009.

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PRELIMINARY OBJECTIONS SUBMITTED BY GERMANY

EXCEPTIONS PRÉLIMINAIRES PRÉSENTÉES PAR L'ALLEMAGNE

1. The present Submissions on Preliminary Objections contain the following parts:

- In Part I, Germany explains that it raises Preliminary Objections against the Application of the Principality of Liechtenstein. Germany refrains from commenting on the issues related to the merits of the case.
- In Part II, Germany sets out the factual background of the present dispute, solely for the purpose of demonstrating that the Court lacks jurisdiction to adjudicate Liechtenstein's claims and that these claims are inadmissible.
- In Part III, Germany explains in detail the nature and scope of its Preliminary Objections.
- In Part IV, Germany sets out its Conclusions and Submissions.

PART I

INTRODUCTION

2. The Principality of Liechtenstein (hereafter Liechtenstein) and the Federal Republic of Germany (hereafter Germany) are European States that have maintained good and friendly relations for more than fifty years. They are both members of the Council of Europe and parties to the European Convention on Human Rights. By virtue of the Statute of the Council of Europe and the European Convention on Human Rights they are committed to the rule of law, democratic principles and the protection of fundamental rights.

3. At the end of World War II Czechoslovakia confiscated private property of persons belonging, according to the applicable Czechoslovak legislation, to the "German people" irrespective of their nationality. Germany has always considered these confiscations to be in violation of public international law. Germany profoundly regrets that private property of Liechtenstein citizens was also confiscated in that context. However, Germany has no detailed information about the private property of Liechtenstein citizens affected by these measures and Liechtenstein has not provided such information in the present case.

4. For the very first time in 1999, to the great surprise of Germany, Liechtenstein claimed compensation from Germany for the property confiscated by the authorities of Czechoslovakia at the end of World War II. On 30 May 2001 Liechtenstein lodged an Application with the Registry of the Court against Germany.

5. Liechtenstein claims that

(a) Germany has failed to respect the sovereignty and neutrality of Liechtenstein and has committed other breaches of international law, and

(b) in consequence of its acts, is liable to compensate Liechtenstein for the injuries and damage suffered.

6. Liechtenstein filed its Memorial on 28 March 2002. In its Application and Memorial, Liechtenstein alleges constantly, much to the surprise of the Respondent, that Germany at some date "in the 1990s"[1], a date that changes on numerous occasions in the course of the Memorial, took the decision to change its position to henceforth treat certain property of Liechtenstein nationals as having been "seized for the purpose of reparation or restitution, or as a result of the state of war" without ensuring any compensation for the loss of that property. Germany has never taken such a decision.

7. This surprising factual assertion of an alleged "change of position of Germany" appears in the Application of 30 May 2001 no less than five times, in one form or another. In the Memorial of 28 March 2002 the same factual allegation is then taken up again, repeated, restated, reformulated, elaborated, built upon and repeated again more than 50 times. Consequently, it is rather obvious that the factual assertion of an alleged "change of position" of Germany is the centrepiece, indeed the only basis for Liechtenstein's Application and claims.

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[1] Application of the Principality of Liechtenstein (hereafter: LA), para. 17; Memorial of the Principality of Liechtenstein (hereafter: LM), p. 54, para. 3.2.

8. Germany will show that the alleged "change of position" on its part never occurred and is neither based on nor supported by any demonstrable facts. Given this complete lack of any supportive evidence, it is clear that the alleged "change of position" is an artificial construct purposefully invented. With regard to the purpose of such a dubious invention, one must assume that Liechtenstein is apparently in desperate need of some factual conduct by Germany which might, at least with a minimum degree of plausibility, be presented and exploited as conduct interfering with Liechtenstein's rights. Furthermore, given the fact that the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 entered into force between the Applicant and the Respondent only in 1980, Liechtenstein is apparently equally in desperate need of an alleged factual conduct by the Respondent which, in order to support Liechtenstein's claims, must have occurred after 1980. But, needless to say, even the systematic repetition of false allegations cannot turn them into facts and reality.

9. Germany will demonstrate that this dubious approach has the purpose of constructing the appearance of a factual basis for the Application of Liechtenstein, with regard to jurisdiction, admissibility and the merits of that Application. Accordingly, Germany avails itself of the opportunity provided for by Article 79, paragraphs 1 and 2, of the Rules of Court to contest the jurisdiction of the Court and the admissibility of the Application by raising Preliminary Objections. Germany is of the view that these Preliminary Objections must be decided upon first before the case can possibly be adjudicated on its merits.

10. The present Submissions contain the Preliminary Objections of Germany to the Application of Liechtenstein. The Objections relate to the jurisdiction of the Court as well as to the admissibility of the case. They are six in number. Their subject matter is set out below:

I. The Court has no jurisdiction to entertain the case.

1. There exists no dispute between Liechtenstein and Germany. Germany will show that the "dispute" as alleged by Liechtenstein is a completely artificial invention. Liechtenstein's claims do not meet the requirements for the existence of a dispute firmly established in the jurisprudence of the International Court of Justice, according to which it must be shown that the claim of one party is positively opposed by the other. The alleged change of position by Germany never occurred and is not based on any demonstrable facts **(Preliminary Objection No. 1)**.

2. The Court lacks jurisdiction *ratione temporis*. As the Liechtenstein Memorial shows, all relevant facts that might be the real source of a dispute, a dispute that would, however, be with the Czech Republic, date back to 1945 and the period immediately thereafter. Therefore, the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, which entered into force between the parties in 1980, cannot be a basis for jurisdiction because it does not apply to disputes relating to facts and legal situations prior to 1980 **(Preliminary Objection No. 2)**.

3. Liechtenstein's claims fall within the domestic jurisdiction of Germany. The Liechtenstein Memorial shows that Liechtenstein does not even allege that a rule of public international law was applicable to the dispute brought before the German courts concerning the Pieter van Laer painting. Consequently, that dispute fell exclusively within German domestic jurisdiction. This is also true for the dispute now brought before the International Court of Justice (**Preliminary Objection No. 3**).

II. Liechtenstein's claims are inadmissible:

1. **Liechtenstein's claims are not sufficiently substantiated.** Liechtenstein has not fulfilled the obligation to substantiate its claims. In particular, it has neither given any details on the affected Liechtenstein properties, nor has it identified the alleged victims (**Preliminary Objection No. 4**).

2. **Liechtenstein's claims would require the Court to give judgment on rights and obligations of the Czech Republic in its absence and without its consent.** The Czech Republic is therefore an indispensable third party to the present case. The sovereign acts of a third State, namely Czechoslovakia, the predecessor State of the Czech Republic, would have to be judged by the International Court of Justice if the Court decided the case on its merits. This, however, would require the Czech Republic to give its consent to such a judicial evaluation. The Court has no jurisdiction to decide upon sovereign acts of a third State in a case brought by Liechtenstein against Germany (**Preliminary Objection No. 5**).

3. **The alleged Liechtenstein victims have failed to exhaust local remedies.** By introducing its Application against Germany, Liechtenstein seeks to exercise diplomatic protection for the benefit of its citizens. Therefore, local

remedies available in Czechoslovakia should have been exhausted. Liechtenstein has not proven that that requirement was met (**Preliminary Objection No. 6**).

PART II

STATEMENT OF FACTS

11. After the tragic history Czechoslovakia had endured from 1938 onwards, the Beneš Decrees were adopted in 1945. On the basis of these decrees, agricultural properties, buildings etc. of persons belonging to the "German and Hungarian people" were confiscated.

12. As correctly described in the Liechtenstein Memorial[1], the relevant decrees applied to persons belonging to the "German and Hungarian people", regardless of their nationality. This was laid down expressly in Decree No. 12 of 21 June 1945[2]. In its § 2, this Decree specified:

> "Those persons are considered to belong to the German or Hungarian people who declared on the occasion of every census since the year 1929 that they belonged to the German or Hungarian people, or who have become members of national groups or political parties made up of persons belonging to the German or Hungarian people".

13. Liechtenstein claims that "substantial arable land and forests, numerous buildings and their contents, factories etc." of "[a]bout 38 Liechtenstein nationals"[3] were affected by these measures of confiscation taken by the

---

[1] LM, p. 24, para. 1.13.

[2] LM, Annex 6, vol. I, p. 9.

[3] LM, p. 8, para. 2.

authorities of Czechoslovakia[1]. Liechtenstein states that the then Prince of Liechtenstein and members of his family were particularly affected as owners of large properties. According to the Applicant, they were at no time German nationals.

14. Germany has no information about the property concerned which is not identified in the Liechtenstein Submissions, with the exception of some details concerning one painting that gave rise to a dispute under private law between the Prince of Liechtenstein and the City of Cologne, where this painting was exhibited in 1991.

15. Liechtenstein explains that in 1945 its Government drew up lists of families affected by the confiscation measures of the Czechoslovak authorities[2]. It also points out that the competent judicial instance, the Bratislava Administrative Court, held in a judgment dated 29 November 1951 that the confiscations concerning the then Prince of Liechtenstein were lawful under the law of Czechoslovakia[3].

16. Liechtenstein does not explain whether any of the other property owners have brought any cases before the Czechoslovak courts nor has Liechtenstein explained to what extent the Government of Liechtenstein has exercised diplomatic protection on behalf of Liechtenstein nationals since 1945. In

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[1] Cf. LM, Annex 8, vol. I, p. 32.

[2] LM, p. 27, para. 1.19.

[3] LM, pp. 28-29, para. 1.22. For the judgment of the Bratislava Administrative Court, see LM, Annex 9, vol. I, p. 34.

particular, Liechtenstein has not informed Germany about any contacts with the Government of Czechoslovakia or of the Czech Republic after Czechoslovakia and later the Czech Republic adopted a constitutional system based on the rule of law[1].

17. During the occupation of Germany after 1945 the Council of the Allied High Commission for Germany stated in *Law No. 63 Clarifying the Status of German External Assets and Other Property Taken by Way of Reparation or Restitution* of 31 August 1951[2] that no claim or action in connection with measures against German foreign property was to be admissible in German courts. The same stipulation was later included in the *Convention on the Settlement of Matters Arising out of the War and the Occupation* (hereafter: Settlement Convention)[3], which entered into force on 5 May 1955, on the same day as the *Convention on Relations between the Three Powers and the Federal Republic of Germany* of 26 May 1952 as amended on 23 October 1954. Article 1, paragraph 2, of the latter Convention stated: "The Federal Republic shall have accordingly the full authority of a sovereign State over its internal and external affairs."

18. Article 3 of Chapter Six of the Settlement Convention provided:

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[1] In the Memorial only the steps taken by the Prince as to the family property are described; as to the property of other Liechtenstein nationals the Memorial only refers to the list of persons concerned which had been drawn up by the Government of Liechtenstein, LM, pp. 27-29, paras. 1.19- 1.23.

[2] *Law No. 63 of the Council of the Allied High Commission Clarifying the Status of German External Assets and Other Property Taken by Way of Reparation or Restitution of 31 August 1951*; LM, Annex 15, vol. I, p. 94.

[3] United Nations, *Treaty Series*, vol. 332, p. 219; LM, Annex 16, vol. I, p. 98.

> "1. The Federal Republic shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany.
>
> 2. The Federal Republic shall abide by such provisions regulating German external assets in Austria as are set forth in any agreement to which the Powers now in occupation of Austria are parties or as may be contained in the future State Treaty with Austria.
>
> 3. No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraph 1 and 2 of this Article, or against international organizations, foreign governments or persons who have acted upon instructions of such organizations or governments."

19. In connection with the conclusion of the *Treaty on the Final Settlement with respect to Germany*, signed in Moscow on 1 September 1990, which entered into force on 15 March 1991[1], an *Exchange of Notes between Germany and the three Western Allies* was effected according to which Article 3, paragraphs 1 and 3, of Chapter Six of the Settlement Convention remained in force[2].

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[1] LM, Annex 18, vol. II, p. 175.

[2] LM, Annex 19, vol. II., p. 187.

20. Germany has never recognized the confiscation of German foreign property as lawful[1]. However, German courts have consistently held that they are barred by the Settlement Convention of 1955 from evaluating the lawfulness of any confiscation measures of that sort. Since the decisions rendered by the Federal Court of Justice (Bundesgerichtshof), the highest court for civil matters, on 13 December 1956[2] and 11 April 1960[3] it has been fully established that Article 3 of Chapter Six of the Settlement Convention applies if a foreign State has seized certain assets as German assets. It is the intention of the foreign State to confiscate the assets as German which is decisive for the application of the provision barring German jurisdiction.

21. In its decision of 1960, the Federal Court of Justice held:

> "German courts are barred by the Convention ... from deciding on the claims of the Plaintiff. It is true that the Respondent does not belong to the persons explicitly mentioned in Article 3, paragraph 3, of Chapter Six of the Settlement Convention. ... Nevertheless, German courts have no jurisdiction. Even if the conditions of Article 3, paragraph 3, of Chapter Six of the Settlement Convention are not fulfilled, German courts lack jurisdiction in a case in which the Plaintiff is trying to raise an objection against measures

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[1] Cf. LM, p. 55, para. 3.4.

[2] In this case, the so-called *AKU case*, the Federal Court of Justice held: "[T]he question as to the admissibility of this action [i.e., the confiscation] depends only on whether the holdings which are the subject of the proceedings must be deemed to have been confiscated by the Netherlands Decree to the extent to which they are still claimed by the plaintiffs. *This* question can be determined only by the law of the confiscating State...", 23 *International Law Reports*, p. 21, at 22-23, Preliminary Objections of Germany (hereafter: GPO), Annex 2.

[3] Federal Court of Justice, 32 *Collection of decisions* (BGHZ), p. 170, cited in LM, pp. 64 ff; para. 3.19, GPO, Annex 3.

> mentioned in Article 3, paragraph 1, of Chapter Six of the Settlement Convention.
>
> Article 3 of Chapter Six of the Settlement Convention is not inapplicable for the reason that the provision concerns German assets and the Plaintiff challenges the seizure arguing that the assets were not German assets. For the application of this provision it is sufficient that the assets were seized as German assets. Article 3, paragraph 1, of Chapter Six of the Settlement Convention concerns those measures which were directed against German assets as understood by the enemy-legislation of the State which seized the assets; whether the assets seized according to this legislation were in fact German or foreign assets is to be decided exclusively by the State which has seized the assets. ... If the foreign Plaintiff wants to raise claims against the seizure, the only remedies available are those which exist under the law of the State which has seized the assets. The courts of the Federal Republic are not in a position to render a judgment on the legality of the seizure or a judgment intended to interfere with the decision of the foreign State concerning the legality of the seizure."[1]

22. This case law was confirmed by the German court decisions in the case concerning a painting which was brought from Brno to Cologne and was claimed by the Prince of Liechtenstein as his property (hereafter: *Pieter van Laer Painting* case)[2]. The court procedures were brought by the Prince of Liechtenstein against the City of Cologne when in 1991 the Wallraf-Richartz-Museum, which is a museum of the City of Cologne, staged a large exhibition of

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[1] GPO, 32 *BGHZ*, p. 172 ff., translation by Counsel, GPO, Annex 3.

[2] LM, pp. 29-32, paras. 1.24 - 1.29.

Dutch painters of the 17th century. One of the exhibited paintings was the "Szene um einen römischen Kalkofen" ("Scene set around a Roman kiln"), which, according to the plaintiff in that case, had been confiscated by Czechoslovakia in or after 1945 in a castle belonging to his father, the then reigning Prince of Liechtenstein.

23. On 10 October 1995 the Cologne Regional Court (Landgericht), following a hearing, declared the plaintiff's action inadmissible[1]. In the court's view, Article 3 of Chapter Six of the Settlement Convention excluded German jurisdiction regarding the case. The Regional Court found that the confiscation constituted a measure within the meaning of that provision. The Regional Court rejected in particular the plaintiff's argument that this provision did not apply as it only concerned measures carried out with regard to German external assets or other property and his father had never been a German citizen. In this respect, the Court, referring to the case law of the Federal Court of Justice, stated that the view of the confiscating State was decisive. The aim and purpose of this provision, namely to immunize confiscation measures implemented abroad, could only be achieved by excluding such measures from judicial review in Germany.

24. On 9 July 1996 the Cologne Court of Appeal (Oberlandesgericht) dismissed the plaintiff's appeal[2]. The Court of Appeal confirmed that the plaintiff's action was

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[1] Original text and translation in: LM, Annex 28, vol. II, p. 256.

[2] Original text and translation in: LM, Annex 29, vol. II, p. 289.

inadmissible as German jurisdiction in respect of his claim was excluded under Article 3, paragraph 1, in conjunction with paragraph 3, of Chapter Six of the Settlement Convention. These provisions excluded German jurisdiction in respect of claims and actions against persons who, as a consequence of reparation measures, had directly or indirectly acquired title to German property confiscated abroad. The Court of Appeal further considered that Article 3, paragraph 3, of Chapter Six of the Settlement Convention applied in the plaintiff's case. In the Court's view, this provision was the procedural consequence of the idea that the legal relations resulting from the liquidation of German property abroad by foreign powers for the purpose of reparation were "final and unchallengeable". Following the above mentioned case law of the Federal Court of Justice, the Court of Appeal considered that the notion of "German external assets" had to be interpreted in the light of the law of the expropriating State. The confiscation in dispute was found to be in compliance with the legislation of the expropriating State since the competent Czechoslovak administrative authorities as well as the Bratislava Administrative Court had found that Presidential Decree No. 12 of 21 June 1945 applied to the confiscated property.

25. On 29 January 1998 the Federal Constitutional Court, through a Chamber of three judges, refused to entertain the plaintiff's constitutional complaint as it offered no prospect of success[1]. The Federal Constitutional Court considered

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[1] Original text and translation in: LM, Annex 32, vol. II, p. 353.

that the interpretation of the terms "measures against German external assets" as comprising any measures which, in the intention of the expropriating State, were directed against German assets, could not be objected to under constitutional law. The bar on litigation did not constitute an agreement to the detriment of Liechtenstein, as only the Federal Republic of Germany and its courts were under this treaty obligation.

26. After the German courts had finally decided the *Pieter van Laer Painting* case, Liechtenstein asked for consultations with the German Government. Given the friendly relations between the two countries, Germany declared itself ready to hold such consultations. Consequently, two rounds of talks took place on 10 July 1998 in Bonn and on 14 June 1999 in Vaduz. These talks had a purely consultative character. Since the German Government had not been involved in the legal proceedings before the German courts in the *Pieter van Laer Painting* case, the German side clarified that it was not its role to comment on the substance of these decisions. At the same time, the German side emphasized that it did not share Liechtenstein's view according to which the decisions of the German courts concerning the painting had been contrary to international law.

27. In an Aide-mémoire of 9 December 1999, Liechtenstein for the very first time expressed the expectation that the Government of the Federal Republic of Germany would commence negotiations in the matter of Liechtenstein citizens

affected, with the objective of reaching just compensation[1]. In a letter of 20 January 2000, the German Foreign Minister declared "that the German Government does not share the legal opinion" expressed in the Aide-mémoire. He continued: "Even upon renewed examination of the legal and factual position, they [i.e., the German Government] do not see a possibility to make compensation payments to the Principality of Liechtenstein for losses of property suffered as a result of post-war expropriations in former Czechoslovakia"[2].

28. On 28 July 1998, the Prince of Liechtenstein brought an application before the European Commission of Human Rights alleging a violation of the European Convention on Human Rights by the decisions of the German courts concerning the painting. The Prince invoked Article 6, paragraph 1, of the Convention which guarantees effective access to court, and Article 1 of Protocol No. 1, which guarantees the right to property. The European Court of Human Rights, in a judgment of 12 July 2001[3], unanimously rejected the application and found that no violation of the European Convention on Human Rights had taken place. As to the alleged violation of Article 6, paragraph 1, of the Convention, the Court found that

> "the exclusion of German jurisdiction under Chapter 6, Article 3 of the Settlement Convention is a consequence of the particular status

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[1] LM, Annex 44, vol. II, p. 489; cf. LM, pp. 83 ff, paras. 3.55 ff.

[2] LM, p. 84; text of the letter in LM, Annex 45, vol. III, p. 503.

[3] *Prince Hans-Adam II of Liechtenstein* v. *Germany, Judgment, 12 July 2001*, GPO, Annex 1.

> of Germany under public international law after the Second World War. It was only as a result of the 1954 Paris Agreements with regard to the Federal Republic of Germany and the Treaty on the Final Settlement with respect to Germany of 1990 that the Federal Republic secured the end of the Occupation Regime and obtained the authority of a sovereign State over its internal and external affairs for a united Germany. In these unique circumstances, the limitation on access to a German court, as a consequence of the Settlement Convention, had a legitimate objective"[1].

The exclusion of jurisdiction of German courts was, therefore, compatible with Article 6, paragraph 1, of the European Convention on Human Rights, which guarantees in principle access to the courts in cases of this sort.

29. As to the alleged violation of Article 1 of Protocol No. 1 to the European Convention, the Court underlined that a violation could only be invoked by the applicant insofar as the decisions of the German courts related to his "possessions" within the meaning of that provision. In this context the Court recalled that:

> "according to the established case-law of the Convention organs, 'possessions' can be 'existing possession' or assets, including claims, in respect of which the applicant can argue that he has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a 'possession' within the meaning of Article 1 of Protocol No. 1, nor can a conditional

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[1] *Prince Hans-Adam II of Liechtenstein* v. *Germany*, para. 59, GPO, Annex 1.

> claim which lapses as a result of the non-fulfilment of the condition"[1].

After clarifying that the Court was not competent *ratione temporis* to examine the measures taken in 1945, it continued:

> "Subsequent to this measure, the applicant's father and the applicant himself had not been able to exercise any owner's rights in respect of the painting which was kept by the Brno Historical Monuments Office in the Czech Republic.
>
> In these circumstances, the applicant as his father's heir cannot, for the purposes of Article 1 of Protocol No. 1, be deemed to have retained title to property nor a claim to restitution against the Federal Republic of Germany amounting to a 'legitimate expectation' in the sense of the Court's case-law.
>
> This being so, the German court decisions and the subsequent return of the painting to the Czech Republic cannot be considered as an interference with the applicant's 'possession' within the meaning of Article 1 of Protocol No. 1"[2].

30. On 30 May 2001, Liechtenstein lodged its Application instituting proceedings in the name of the Principality of Liechtenstein against the Federal Republic of Germany before the International Court of Justice.

31. In its Application as well as in its Memorial of 28 March 2002, Liechtenstein alleges time and again that Germany at some unspecified date "in the 1990s" took the decision to change its position and to henceforth treat certain property

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[1] *Prince Hans-Adam II of Liechtenstein* v. *Germany*, para. 83, GPO, Annex 1,.

[2] *Prince Hans-Adam II of Liechtenstein* v. *Germany*, paras. 85-86, GPO, Annex 1.

of Liechtenstein nationals as having been "seized for the purpose of reparation or restitution, or as a result of the state of war", without ensuring any compensation for the loss of that property. More specifically, in Part I of the Liechtenstein Memorial dealing with the alleged "Factual Background" of the case, the whole of Chapter II is devoted to the allegation of "Germany's Change of Position". Thus, Liechtenstein bases its claim on an alleged "change of position" of Germany which is inferred from the decisions of the German courts in the *Pieter van Laer Painting* case and some statements of officials of the German Government[1].

32. Germany wishes to state explicitly that the alleged "change of position of Germany" never occurred and is neither based on nor supported by any demonstrable facts. Only by means of gross distortion can continued German adherence to legal obligations under the Settlement Convention be presented as a "change of position" concerning Liechtenstein property confiscated by a third party, namely Czechoslovakia. With regard to this purposeful invention, Germany submits that the Liechtenstein Memorial cannot be considered as containing "a statement of the relevant facts" pursuant to Article 49, paragraph 1, of the Rules of Court.

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[1] See LM, p. 8, para. 3: "Beginning in 1995, Germany has classified all the Liechtenstein property as having been 'seized for the purpose of reparation or restitution, or as a result of the state of war', within the meaning of Article 3 of Chapter Six of the [Settlement Convention]. It has done so by a combination of decisions of its courts and statements by Ministers and officials."

33. Consequently, Germany submits that Liechtenstein's claims, unsupported by any coherent facts, should be rejected *a limine* by the Court for the reasons explained in the following Preliminary Objections.

PART III

GERMANY'S PRELIMINARY OBJECTIONS

THE COURT HAS NO JURISDICTION TO ENTERTAIN LIECHTENSTEIN'S CASE

34. Germany submits that Liechtenstein has not been able to establish a legal basis for the jurisdiction of the International Court of Justice in the case brought against Germany on 30 May 2001. First, Germany will explain that there exists no "dispute" between Liechtenstein and Germany in the sense of the case law of the Court. Second, Germany will show that all aspects of the alleged dispute are outside the temporal jurisdiction of the Court. Third, Germany will demonstrate that Liechtenstein's claims fall exclusively within the domestic jurisdiction of Germany.

Section I.

There Exists No Dispute between Liechtenstein and Germany

35. The existence of a "dispute" constitutes the most fundamental prerequisite of the jurisdiction of the Court in inter-State litigation. The condition that a "dispute" must have arisen for the Court to exercise its functions in contentious proceedings has not only found expression in various provisions of the Statute of the International Court of Justice, including Article 38, paragraph 1, and Article 40, but has also been emphasized time and again in the Court's jurisprudence. For instance, in its Judgments in the *Nuclear Tests* cases the Court stated that

> "the existence of a dispute is the primary condition for the Court to exercise its judicial function."[1]

Thus, basing itself on the pertinent provisions of the Statute and the very idea of the judicial function, the Court leaves no doubt that the existence of a dispute must be identified before the Court enters into questions of jurisdiction and admissibility proper, not to mention the stage of the merits of a given case.

36. In its first Preliminary Objection, Germany therefore submits that, due to the absence of a dispute between Liechtenstein and Germany, the Court cannot, and should not, exercise its judicial function in the present case.

37. In presenting this objection, Germany will proceed as follows:

First, Germany will briefly restate the crucial elements of the concept of "dispute" as developed in the jurisprudence of the Court (*infra*, A.).

Second, in the light of the special circumstances of the present case, Germany will request the Court to decline *ab initio* to render a decision in instances like the present one, in which the applicant arbitrarily distorts the facts and the law in order to make an alleged "dispute" fit within the Court's jurisdiction. Germany will argue that in order to establish the existence of a "dispute" within the meaning of the Court's Statute, it is not sufficient for an applicant to somehow construct opposing views between two States, but that an application and the claims contained therein must constitute a true reflection of legal problems which exist in reality according to indisputable facts (*infra*, B).

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[1] *Nuclear Tests (Australia* v. *France), I.C.J. Reports 1974*, p. 271, para. 55; *Nuclear Tests (New Zealand* v. *France), I.C.J. Reports 1974*, p. 476, para. 58.

Third, Germany will demonstrate that, if looked at objectively, the "claims" brought before this Court against the Respondent by Liechtenstein have nothing to do with the real difficulties faced by Liechtenstein with respect to the seizure of property of some of its citizens in former Czechoslovakia in the aftermath of the Second World War. None of the claims raised in Liechtenstein's Application constitute a dispute within the meaning of the Court's Statute (*infra*, C).

Fourth, and finally, Germany will argue that, in any event, it is the wrong Respondent in the present case, the only conceivable dispute being one between Liechtenstein and the Czech Republic (*infra*, D).

A. THE COURT'S JURISPRUDENCE ON THE CONCEPT OF "DISPUTE"

38. The classical definition of the term "dispute" was coined by the Permanent Court of International Justice in 1924 in the *Mavrommatis* case. The Permanent Court stated:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[1]

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[1] *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A No. 2*, p. 11. The authoritative French text reads as follows: "Un différend est un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts entre deux personnes."

39. Subject only to minor adjustments[1], this definition has been constantly applied by both the Permanent Court and its successor, the International Court of Justice.[2] The present Court then clarified that for it to have jurisdiction, a *real* dispute must exist between the parties. In the words of the Judgment on *Preliminary Objections* in the *South West Africa* cases:

> "[I]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. *It must be shown that the claim of one party is positively opposed by the other.*"[3]

40. Finally, the Court has emphasized that it is not bound by the determination of the dispute as made by the applicant in a given case. Only recently, in the *Fisheries Jurisdiction* case, the Court reaffirmed that

> "[i]t is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on

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[1] Such as the replacement of the expression "persons" by the more accurate formulation "parties", *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 99, para. 22.

[2] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 314 f., para. 87; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 122, para. 21; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22.

[3] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328 (emphasis added). See also *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 260, para. 24; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 463, para. 24.

an objective basis the dispute dividing the parties, by examining the position of both parties"[1].

41. Thus, the concept of "dispute" as it stands today comprises three essential elements: There must exist (a) a disagreement on a point of law or fact, a conflict of legal views or of interests between the parties, which (b) manifests itself in claims of the parties positively opposing each other; these claims in turn (c) serving as the point of departure for the Court itself to determine on an objective basis the existence of a dispute between the parties.

42. According to this settled jurisprudence of the Court, in order to establish the existence of a dispute it must therefore also be shown that the claim of one party is positively opposed by the other[2]. Germany will demonstrate that the "dispute" alleged by Liechtenstein vanishes into thin air if these criteria are applied (see *infra*, C).

43. Before doing so, however, Germany invites the Court to take the opportunity presented by the instant case to further develop and specify the concept of

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[1] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p.432,* p. 448, para. 30, referring also to *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974,* p. 466, para. 30; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) *Case, Order of 22 September 1995, I.C.J. Reports 1995,* p. 304, para. 55. See also *East Timor, I.C.J. Reports 1995,* pp. 99-100, para. 22.

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328. See also *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985,* p. 217, para. 46; *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), 1927, P.C.I.J., Series A, No. 11*, p. 11.

"dispute" in perfect harmony with the Court's already established jurisprudence on the "objective" character of this concept.

B. THE COURT SHOULD DECLINE TO ADJUDICATE ARTIFICIALLY CONSTRUCTED CASES

44. The jurisprudence of the Court leaves no doubt that the question of whether or not a dispute exists cannot depend upon the subjective assertions of the parties but is a matter for objective determination by the Court. It has never been questioned that the fundamental principle according to which the Court is the master of its own jurisdiction[1] also applies to such determination of the existence of a dispute as "the primary condition for the Court to exercise its judicial function"[2].

45. As a rule, the Court will decide whether or not, and to what extent, it is called upon to exercise its judicial function on the basis of a comparative analysis of the positions of both parties. Germany submits, however, that in certain cases the objective determination of a dispute cannot be limited to this exercise. What Germany has in mind here are cases in which an applicant, by the way in which he presents the facts and ensuing claims, attempts to divert the Court from its proper function, namely to decide *real* disputes. Such attempts affect the judicial integrity of the Court.

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[1] See in greater detail on this fundamental issue Shihata, *The Power of the International Court to determine its own Jurisdiction: Compétence de la Compétence* (1965).

[2] *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, p. 271, para. 55; *Nuclear Tests (New Zealand v. France), I.C.J. Reports 1974*, p. 476, para. 58.

46. For the Court, the maintenance of its judicial integrity has always been the ultimate test whether or not it will allow a case to proceed to the stage of the merits. As the Court stated in the *Northern Cameroons* case:

> "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity. …
>
> The [judicial] function is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case. Nevertheless, it is always a matter for the determination of the Court whether its judicial functions are involved."[1]

47. The principles thus enunciated are of general validity: It is for the Court itself, and not for the parties, to safeguard the Court's judicial integrity, and it is always for the Court to determine whether its judicial functions are involved.

48. Germany submits that in this regard there exists an inextricable nexus between the concept of dispute on the one hand and the judicial function of the Court on the other. If an applicant were allowed to arbitrarily squeeze any kind of facts, interests and claims into the frame of a "dispute", the required objective examination of the positions of both parties by the Court would become

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[1] *Northern Cameroons, Preliminary Objections, I.C.J. Reports 1963,* pp. 29-30.

meaningless: In the last instance it would always be the applicant which would have the power to determine the existence and scope of an alleged "dispute".

49. The Court's role as the master of its own jurisdiction would be rendered impossible if the decision upon this "primary condition for the Court to exercise its judicial function" were to pass into the hands of the applicant. The Court should therefore not allow the parties to "invent" a dispute when it is obvious to any observer looking at the matter in a sober and reasonable way that no such dispute exists in reality. Germany submits that in order for a given subject-matter to be considered a "dispute" within the meaning of the Statute of the Court, there must be a reasonable relationship between the facts alleged to constitute the true essence of the case and the claims brought before the Court. Germany will show that Liechtenstein's case does not meet this requirement (*infra*, C).

50. Unlimited discretion on the part of an applicant as to the framing of its "dispute" would encourage States to (mis-)use the Court for purposes not embraced by its judicial function. If the parties were allowed to present the Court with an arbitrary selection of facts, interests and legal relationships artificially, if not forcibly, extracted from a complex and inseparable whole, the controversies involved could not be definitively settled by a judicial decision. On the contrary, they might even be aggravated.

C. THERE IS NO DISPUTE BETWEEN THE PARTIES SINCE IN REALITY NO POSITIVELY OPPOSED CLAIMS EXIST

51. An impartial evaluation of the facts which underlie the present Application cannot but come to the conclusion that what is in reality at the heart of the present case is the seizure of certain Liechtenstein property under the Beneš Decrees of 1945 in former Czechoslovakia. The very essence of Liechtenstein's claims therefore relates to certain legal consequences arising from this taking of Liechtenstein property by a third State. Viewed in an unprejudiced and objective way, what Liechtenstein really seeks in the present proceedings is an "indemnisation" for the loss of certain property of its citizens through confiscations effected by Czechoslovakia in the immediate aftermath of World War II. Thus, once the Applicant's claims are stripped of the distortions by which Liechtenstein aims to hide a few very simple facts behind a smokescreen of unfounded assertions, it will become evident to any objective observer that the real dispute, if any, is one between the confiscating State on the one hand and the State claiming the unlawfulness of these measures on the other. Indeed, Liechtenstein openly admits that it could not bring this "true" dispute before the Court. Since it cannot bring the "true" respondent before the Court, what Liechtenstein tries to do is to set up in a wholly artificial way a number of allegedly opposing views between itself and Germany that are, if at all, only very remotely and arbitrarily linked with the "true" dispute.

52. Thus, without the need to touch in any way on questions belonging to the merits of the case, it becomes obvious that the facts which are at the core of the Application and the claims actually raised by Liechtenstein do not correspond to

one another at all. Since adjudicating purposefully invented disputes is contrary to the Court's judicial function, the Court should not accept Liechtenstein's claims as establishing a "dispute" with Germany within the meaning of the Court's Statute, and should reject the Applicant's case on this ground.

53. To recall once again: In its long-standing jurisprudence, the International Court of Justice has maintained an "objective" definition of what constitutes a dispute. This definition penetrates to the real issues between the parties rather than merely basing itself on the formulation advanced by an applicant. If one pursues such an objective analysis, the only real legal controversy between the parties to the present case concerns the exclusion of jurisdiction of German courts over Liechtenstein assets (that is, assets owned by Liechtenstein citizens) seized by former Czechoslovakia in the aftermath of Word War II, pursuant to Article 3 of Chapter Six of the Settlement Convention. Germany fails to see what else could be in dispute between Germany and Liechtenstein regarding the treatment of Liechtenstein assets by a third State, namely (former) Czechoslovakia.

54. In its brief section on "The dispute between Liechtenstein and Germany", the Liechtenstein Memorial alleges that a change in the German legal position towards the seizure of Liechtenstein property by Czechoslovakia occurred by virtue of the pronouncements of German courts in the *Pieter van Laer Painting* case[1]. This allegation is wholly unfounded. Liechtenstein does not properly

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[1] LM, p. 12, para. 13. The final judgment of the German Federal Constitutional Court of 28 Jan. 1998 concerning the painting has been reproduced in LM, Annex 32, vol. II, p. 353, along with earlier judgments of German courts on the matter, *ibid.*, pp. 256 ff.

separate the issue of the lawfulness of the Czechoslovak expropriations and that of the jurisdiction of German courts on this matter. On the former question, Liechtenstein itself cites (then) Chancellor Kohl's 1997 statement to the effect that the (then forthcoming) German-Czech Joint Declaration[1] would "leave[] open legal questions in connection with expropriations in the then Czechoslovakia"[2]. And, indeed, Point IV of the said Declaration reads, in the translation provided by Liechtenstein:

> "Both sides agree that the wrongs committed shall be a matter of the past, and will therefore orient their relations towards the future … while each side remains committed to its legal order and respects that the other side has a different legal position."[3]

55. From this statement it is clear that Germany has steadfastly maintained its position towards the Beneš Decrees and other legal issues between Germany and the Czech Republic. No change of position of Germany regarding these matters has ever occurred. Germany has never recognized the validity of the relevant Czechoslovak measures against Liechtenstein property, neither before nor after 1995. Liechtenstein expressly states that it always agreed with this German position[4]. Accordingly, there exists no legal dispute on this matter at all.

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[1] *Declaration on Mutual Relations and Their Future Development*, 21 January 1997, LM, Annex 37, vol. III, p. 467.

[2] LM, Annex 40, vol. III, p. 479.

[3] LM, Annex 37, vol. III, p. 467.

[4] LM, p. 12, para. 12, p. 29, para. 1.23.

56. Again no change of the German position has occurred concerning the exclusion of German jurisdiction on the basis of Article 3 of Chapter Six of the Settlement Convention, from early German court decisions immediately following the adoption of the Settlement Convention[1] up to the more recent pronouncements now assailed by Liechtenstein. The exclusion of German jurisdiction, however, is not, and has never been, tantamount to a recognition of, or a change regarding the recognition of, the seizure of Liechtenstein property by Czechoslovakia. Germany maintains that it is under no obligation to lift that bar to jurisdiction. On the contrary, since Article 3 of Chapter Six of the Settlement Convention remains in force, it would not be permissible for Germany to lift the exclusion of jurisdiction unilaterally. Rather, Germany is obliged to keep it in force by virtue of an obligation arising from a multilateral treaty, that is, the relevant provision of the Settlement Convention, as upheld by the *Exchange of Notes concerning the Relations Convention and the Settlement Convention* of 28 September 1990[2] in the wake of the conclusion of the *Treaty on the Final Settlement with respect to Germany*[3].

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[1] *AKU Case*, Federal Court of Justice, Judgment of 13 Dec. 1956, 23 *ILR*, p. 21, GPO, Annex 2; Federal Court of Justice, Judgment of 11 Apr. 1960, 32 *BGHZ*, pp. 172-73, GPO, Annex 3.

[2] *Exchange of Notes concerning the Relations Convention and the Settlement Convention*, United Kingdom, Federal Republic of Germany, France, United States, Bonn, 28 September 1990, United Nations, *Treaty Series*, No. 28492, vol. 1656, p. 29, LM, Annex 19, vol. II, p. 187.

[3] *Treaty on the Final Settlement with respect to Germany* ("Two-plus-Four-Treaty"), Federal Republic of Germany, German Democratic Republic, France, Union of Soviet Socialist Republics, United Kingdom, United States, Moscow, 12 September 1990, United Nations, *Treaty Series*, No. 29226, vol. 1696, p. 115, LM, Annex 18, vol. II, p. 175.

57. Thus, as far as the first submission of Liechtenstein is concerned, Germany cannot detect any dispute between the parties. Germany has never changed its "conduct" towards Liechtenstein or Liechtenstein property, neither in 1995 nor at any other date. Germany continues to respect the sovereignty and neutrality of Liechtenstein, and it continues to recognize the legal rights of Liechtenstein and its nationals with respect to their property.

58. The only disagreement that really exists between the parties concerns the interpretation of the exclusion of jurisdiction of German courts over property "seized for the purpose of reparation or restitution, or as a result of the state of war" by a third country, namely Czechoslovakia. In this regard, however, Germany is legally obliged to conform to the relevant provision of a treaty validly concluded with other States, namely France, the United Kingdom and the United States of America. The European Court of Human Rights has accepted the respective interpretation of the Settlement Convention by German courts. Liechtenstein fails to show how continued German respect for and strict adherence to legal obligations contained in the Settlement Convention can lead to any conceivable negative consequences in international law. Thus, there exists no dispute between the parties regarding Liechtenstein's claims as to its sovereignty and neutrality as well as to its legal rights and the rights of its citizens with respect to the Liechtenstein property in the former Czechoslovakia.

D. THE DISPUTE REGARDING EXPROPRIATION OF LIECHTENSTEIN ASSETS IN FORMER CZECHOSLOVAKIA IS IN REALITY A DISPUTE BETWEEN LIECHTENSTEIN AND THE CZECH REPUBLIC

59. Regarding the second Submission advanced by Liechtenstein, the real grievance concerns the seizure of Liechtenstein property by a third State, namely Czechoslovakia. What injury Liechtenstein could possibly have suffered "as a result of the change in Germany's legal position"[1] remains a mystery.

60. The issue of compensation advanced by Liechtenstein can only arise if and to the extent that Liechtenstein is able to show that unlawful conduct on the part of Germany has resulted in injury to Liechtenstein. In this regard, even if all statements on the facts made by Liechtenstein were held to be correct, they still would not justify a claim to compensation by Germany. In reality, again, what is at issue here is not this or that German act related to Czechoslovak confiscations but the lawfulness of the Czechoslovak measures as such, and resulting obligations of compensation on the part of the successor States to former Czechoslovakia. Between Liechtenstein and Germany there exists no dispute concerning the lawfulness of the Czechoslovak seizures. Rather, the dispute is one between Liechtenstein and the successor(s) of former Czechoslovakia.

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[1] LM, p. 14, para. 16.

E. CONCLUSION

61. Regarding Liechtenstein's first Submission, there exists no legal dispute between the parties because Liechtenstein is not assailing the exclusion of German jurisdiction as such. Germany has always recognized and respected the sovereignty and neutrality of Liechtenstein, and continues to do so. In the same sense it has always recognized the legal rights of Liechtenstein and its nationals with respect to their property.

62. As to Liechtenstein's second Submission concerning the compensation issue, there exists no legal dispute between the parties either. Issues of compensation are to be decided between the State confiscating foreign property and the State victim of such measures. Thus, if any dispute concerning compensation exists, it could only be a dispute between Liechtenstein and the successor State(s) of Czechoslovakia, not between Liechtenstein and Germany.

63. As to the third and fourth Submissions by Liechtenstein (1 (c), 2), they both presuppose a dispute on the issues just dealt with. However, since these matters are undisputed, in reality, there exists no legal dispute on Liechtenstein's further claims.

Section II.

The Court Lacks Jurisdiction *ratione temporis*

64. Germany will now explain the limitation *ratione temporis* as interpreted by the Court and then show that all aspects of the dispute as alleged by Liechtenstein are outside the temporal jurisdiction of the Court.

A. THE ALLEGED BASIS FOR JURISDICTION IS NOT APPLICABLE *RATIONE TEMPORIS*

65. Liechtenstein relies on Article 1 of the *European Convention for the Peaceful Settlement of Disputes* of 29 April 1957 (hereafter the "Convention") as the basis for the jurisdiction of the International Court of Justice. This Convention entered into force between Germany and Liechtenstein on 18 February 1980, Germany having ratified the Convention on 2 March 1961 and Liechtenstein on 18 February 1980. The Convention applies to legal disputes between member States. The Convention is, however, not applicable to the dispute as described by Liechtenstein, assuming *arguendo* that a legal dispute exists.

66. Article 27 of the Convention provides that the Convention shall not apply to:

> "(a) disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute.
>
> (b) … ."

This provision excludes the present case from the application of the Convention and therefore from the jurisdiction of the Court.

According to the case law of the Court (see *infra,* 1) disputes relating to facts or legal situations prior to the entry into force of this Convention as between the parties are those disputes whose "real source" or "real cause" are facts prior to the entry into force of the Convention between the parties. That is the situation here.

67. Clauses restricting the jurisdiction of the Court *ratione temporis* are principally concerned with two sorts of dates: the date on which a dispute arose and the dates on which facts and legal situations developed to which the dispute relates. Frequently both alternatives are combined. Where only the second alternative is relevant, as in the Convention of 1957, it has to be analyzed which facts or legal situations are the real cause of the dispute. Germany will show that all facts and legal situations which are the real cause of the alleged dispute are outside the jurisdiction of the Court.

1. The Case Law of the Permanent Court Concerning Restrictions ratione temporis *Shows that the Present Case is Excluded*

68. The International Court of Justice as well as the Permanent Court of International Justice have dealt in several cases with the interpretation of rules excluding from their jurisdiction facts and legal situations prior to the act by which the jurisdiction of the courts was established. These cases did not concern the interpretation of treaties like the Convention but the interpretation of declarations under the Optional Clause. As the Permanent Court of International

Justice explained in the *Phosphates in Morocco* case[1], the intention of limitations *ratione temporis* like the one included in the European Convention is clear. They are inserted

> "with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise"[2].

69. The Court then added that the use of the two terms "situations" and "facts" placed in conjunction with one another, so that the limitation *ratione temporis* is common to them both, makes it clear that the employment of one term or of the other could not have the effect of extending the compulsory jurisdiction. Rather, as the Court stated,

> "the situations and the facts which form the subject of the limitation *ratione temporis* have to be considered from the point of view both of their date in relation to the date of ratification and of their connection with the birth of the dispute. Situations or facts subsequent to the ratification could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose"[3].

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[1] *Phosphates in Morocco, Preliminary Objections, Judgment, P.C.I.J., Series A/B No. 74*, p. 10.

[2] *Phosphates in Morocco, Preliminary Objections, Judgment, P.C.I.J., Series A/B No. 74*, p. 24.

[3] *Phosphates in Morocco, Preliminary Objections, Judgment, P.C.I.J., Series A/B No. 74*, p. 24.

70. The Court underlined that in interpreting a clause of that sort it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance. The Court added the important sentence:

> "But it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute"[1].

71. In the specific case the Court found that it had no jurisdiction concerning French legislative acts which were seen as the basis for the dispute by the Italian Government. The situation which the Italian Government denounced as unlawful was a legal position resulting from the French legislation of 1920, prior to the entry into force of the French declaration. According to the Court this legal position could not be considered separately from the legislation of which it was the result and therefore it was outside the jurisdiction of the Court[2].

72. As shown by the extensive treatment of facts and legal situations falling into the period between 1945 and around 1955, but always prior to 1980, in the

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[1] *Phosphates in Morocco, Preliminary Objections, Judgment, P.C.I.J., Series A/B No. 74*, p. 24.

[2] *Phosphates in Morocco, Preliminary Objections, Judgment, P.C.I.J., Series A/B No. 74*, pp. 25-26.

Memorial of Liechtenstein[1], the present dispute has its real cause in these facts and situations and is therefore outside the jurisdiction of the Court.

2. A Comparison with the Case Law of the International Court of Justice Shows that the Present Case is Excluded from the Jurisdiction of the Court ratione temporis

73. In the *Right of Passage*[2] case, decided by the International Court of Justice in 1960, the Court had to interpret a declaration by India, which had accepted the jurisdiction of the Court "over all disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date". In this instance the Court found that it had jurisdiction. The Court explained in detail why this was the case.

74. After clarifying the nature of the dispute and the time when that dispute arose, the Court went into the question of whether the dispute was one with regard to facts and situations prior to the date of the Indian declaration. Here the Court relied on the interpretation developed by the Permanent Court in the *Electricity Company of Sofia and Bulgaria*[3] case and stated that the facts or situations to which regard must be had in this connection are "those which must be considered as being the source of the dispute", those which are its "real cause". It explained that the Permanent Court, in this connection, was unwilling to

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[1] LM, pp. 33 ff., para. 2.1 ff.

[2] *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6.

[3] *Electricity Company of Sofia and Bulgaria, Preliminary Objections, Judgment, P.C.I.J., Series A/B, No. 77*, p. 64.

regard as such real cause an earlier arbitral award which was the source of the rights claimed by one of the Parties, but which had given rise to no difficulty prior to the facts constituting the subject of the dispute. The Court explained, therefore, that the Permanent Court had drawn a distinction between the situations or facts which constitute *the source of the rights* claimed by one of the Parties and the situations or facts which are the *source of the dispute*. Only the latter are to be taken into account for the purpose of applying the declaration accepting the jurisdiction of the Court[1].

75. The Court then applied these principles to the situation in the *Right of Passage* case. It explained that the dispute submitted to the Court was one with regard to a situation and, at the same time, with regard to certain facts: It stated that a controversy arose only in 1954 and the dispute arising then related both to the existence of a right of passage to go into the enclaved territories and to India's failure to comply with obligations which, according to Portugal, were binding upon it in this connection. The Court underlined that a finding that the Court had jurisdiction would not involve giving any retroactive effect to India's acceptance of jurisdiction. The Court would only have to pass upon the existence of the right claimed by Portugal as at July 1954, upon the alleged failure of India to comply with its obligations at that time and upon any redress in respect of such a

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[1] *Electricity Company of Sofia and Bulgaria, Preliminary Objections, Judgment, P.C.I.J., Series A/B, No. 7.*, p. 82.

failure. The Court had not been asked for any finding whatsoever with regard to the past prior to 5 February 1930[1].

76. The *Right of Passage* case shows that the crucial question is whether earlier facts can be seen as the source of the rights which later become the central issue of the dispute, or whether the dispute really concerns those earlier facts or legal situations as such. In the *Right of Passage* case access to the enclaved territories had existed for a long time and it was only after the establishment of the jurisdictional link that India blocked the passage. It was this action which gave rise to the dispute as to whether there really existed a right for Portugal to have access over Indian territory.

77. The difference existing between the *Right of Passage* case and the present one is striking. In the present case it is quite impossible to make a meaningful distinction between the source of the rights alleged by Liechtenstein and the source of the alleged dispute. The entire case revolves around the confiscation of Liechtenstein property by Czechoslovakia in 1945 and thereafter and possible legal consequences of these confiscations. No factual or legal situation existed in 1980 on which Liechtenstein could rely. Germany has never changed its position or practice since the entry into force of the Settlement Convention in 1955. Therefore, the dispute as alleged by Liechtenstein relates entirely to facts and legal situations dating back before 1980. The Court clearly would have to give retroactive effect to the acceptance of jurisdiction if deciding the case.

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[1] *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, pp. 35-36.

78. This shows that the attempt by Liechtenstein to invent facts which could be brought within the jurisdiction of the International Court of Justice after the coming into force of the Convention in 1980 is completely artificial. All the Submissions by Liechtenstein relate to facts and legal situations existing before 1980, namely the confiscation by Czechoslovakia, the reparation regime including the way it was dealt with in the Settlement Convention of 1955, and the legal consequences of these measures as far as movable property is concerned which comes within the jurisdiction of Germany.

79. The "real source of the dispute" in the present case is not to be seen in acts or decisions taken after 1980 but in the legal situation created in 1945 in the aftermath of World War II. Of course, it is correct that a specific dispute arose between the Prince of Liechtenstein and the City of Cologne concerning the Pieter van Laer painting[1]. However, it is quite incorrect to see this dispute as the real source of the present case.

80. A comparison between the *Right of Passage* case and the *Electricity Company of Sofia* case on the one hand and the present one on the other makes that clear. In the first two cases just cited the legal situation existing between the two countries concerned, although based on facts and legal situations prior to the establishment of jurisdiction, was recognized by both sides. That was true for the facts relevant for the right of passage[2] as it was true for the binding character

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[1] Cf. LM, pp. 63 ff., paras. 3.17 ff.

[2] *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 34.

of the awards of the Mixed Arbitral Tribunal in the *Electricity Company of Sofia* case[1].

81. In the present case no similar legal situation had ever been recognized between the two parties to the alleged dispute. Neither had Liechtenstein ever argued that Germany was under a legal obligation to pay compensation to Liechtenstein nor had Liechtenstein ever argued that Germany was bound by rules of international law on how to deal with movable property confiscated in Czechoslovakia in 1945 when brought into German territory.

82. Most recently, in the cases concerning the *Legality of Use of Force*[2], the International Court of Justice also had to apply a temporal restriction to its jurisdiction. These cases also prove that artificial constructions as to the time factor relevant in these circumstances will not be accepted. In these cases the Court decided that a dispute which had clearly arisen before the acceptance of jurisdiction could not be brought within the jurisdiction by the repetition of identical acts after the date relevant for the establishment of jurisdiction. The Court held as follows:

> "Whereas the fact that the bombings have continued after 25 April 1999 and that the dispute concerning them has persisted since that date is not such as to alter the date on which the dispute arose; whereas each individual air attack could not have given rise to a

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[1] *Electricity Company of Sofia and Bulgaria, Preliminary Objections, Judgment, P.C.I.J., Series A/B, No. 77*, p. 82.

[2] See, e.g., *Legality of Use of Force, Provisional Measures (Yugoslavia v. Belgium), Order of 2 June 1999, I.C.J. Reports 1999*, p. 124.

> separate subsequent dispute; and whereas, at this stage of the proceedings, Yugoslavia has not established that new disputes, distinct from the initial one, have arisen between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to [the Respondent]"[1].

B. THE DISPUTE BETWEEN LIECHTENSTEIN AND GERMANY AS ALLEGED BY LIECHTENSTEIN IS OUTSIDE THE TEMPORAL JURISDICTION OF THE COURT

83. In its Application of 13 May 2001 Liechtenstein argues that the dispute between Liechtenstein and Germany arose in 1998 on the basis of the decision of the German Federal Constitutional Court of 28 January 1998[2]. In its Memorial Liechtenstein argues that the dispute concerns a decision by Germany to treat certain property of Liechtenstein nationals as having been "seized for the purpose of reparation or restitution or as a result of the state of war" by a combination of decisions of its courts and statements by ministers and officials beginning in 1995[3].

1. No New Facts of Relevance Arose after 1980

84. Whatever may be taken as the date on which, in the view of Liechtenstein, a dispute arose it is impossible to overlook that it relates to facts and legal

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[1] *Legality of Use of Force, Provisional Measures (Yugoslavia v. Belgium), Order of 2 June 1999, I.C.J. Reports 1999*, pp. 134-135, para. 29.

[2] LA, paras. 17, 21, 22.

[3] LM, p. 8, para. 3.

situations prior to the entry into force of the Convention which establishes the jurisdiction, namely before 1980.

85. This becomes particularly clear when one analyzes the facts to which Liechtenstein refers as occurring after 1995. These facts are German court proceedings and related decisions concerning the Pieter van Laer painting[1]. These German court decisions, however, had nothing to do with the present case since they concerned the status under German private law of movable property confiscated by Czechoslovakia in 1945 and thereafter.

86. Liechtenstein tries to argue that until 1995 or 1998 there had been a specific German legal position which then changed with the proceedings concerning that movable property[2]. However, Liechtenstein commits an important error when it tries to construct a change of attitude by German authorities. No such change has taken place, as is evident from Liechtenstein's allegations themselves.

87. As Liechtenstein correctly explains, German courts have always interpreted Article 3 of Chapter Six of the Settlement Convention as barring German courts from looking into the lawfulness of any measures against property considered German property by the confiscating State. Indeed, Liechtenstein correctly refers to the decision of the Federal Court of Justice of 11 April 1960[3], according to which it is the intention of the authority of the foreign country to

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[1] LM, p. 12, para. 13.

[2] LM, pp. 55 ff., paras. 3.3 ff.

[3] 32 *BGHZ*, pp. 172 ff., GPO Annex 3.

confiscate property as German property which is decisive for the application of this Article of the Settlement Convention. This case law has been applied continually and consistently and has been confirmed by the Federal Constitutional Court in the *Pieter van Laer Painting* case[1]. Therefore, the new facts alleged by Liechtenstein do not exist.

2. The Confiscations by Czechoslovakia are not within the Jurisdiction of the Court ratione temporis

88. As is described in detail in the Memorial of Liechtenstein, the confiscation by a sovereign third State, Czechoslovakia, in 1945-46, of certain property is the origin of the case[2]. Leaving aside the problem of whether these acts could be within the jurisdiction of the Court without the consent of the successor state of Czechoslovakia, the Czech Republic – a problem which will be dealt with separately[3] –, the dispute could not be judicially solved without deciding upon the lawfulness of these decisions taken in 1945-46.

89. Indeed the Memorial of Liechtenstein continually refers to the unlawfulness of the measures taken by Czechoslovakia at that time against Liechtenstein property[4]. Since the alleged dispute could not be decided without judicially

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[1] Cf. *supra*, paras. 22 ff.

[2] LM, pp. 23 ff.

[3] Cf. *infra*, Chapter II, Section II, paras. 151 ff.

[4] LM, pp. 27 ff., paras. 1.17 ff; pp. 94 ff., paras 4.15 ff. *et passim*.

evaluating confiscations carried out in 1945-46 by Czechoslovakia, it relates to facts prior to the entry into force of the Convention between the parties.

90. Liechtenstein tries to argue that it is the change of the German position as to the confiscation which can be seen as the real cause and the source of the alleged dispute. However, this is contradicted by the Liechtenstein Memorial itself. The Liechtenstein Memorial shows that Germany has never recognized the confiscation measures as compatible with public international law[1]. German courts have consistently held that they are barred by the Settlement Convention from investigating these issues[2]. This situation has not changed.

91. Apparently Liechtenstein implies that the German legal position as to the lawfulness under public international law of these confiscations must have the consequence that these measures are to be treated as a nullity in the German legal order[3]. However, this view is completely mistaken. As is well known, private international law rules in most, if not all States do not automatically refer to the lawfulness under public international law of confiscations as far as the validity of title under private international law is concerned. German courts have held consistently that expropriations in violation of public international law may nevertheless be treated as conveying title.

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[1] LM, pp. 55 ff., paras. 3.3 ff.

[2] Cf. *supra*, paras. 20 ff.

[3] LM, pp. 119-120, paras. 5.19-5.22.

92. In its decision of 23 April 1991[1] concerning expropriations in the former Soviet zone of occupation and in the German Democratic Republic, the Federal Constitutional Court explained the situation under German private international law concerning expropriations:

> "According to German international expropriation law, expropriations carried out by a foreign State, including "confiscations" without compensation, are regarded in principle as effective provided that the State in question has not exceeded the limits of its power. According to this principle, an expropriation is effective within the area of territorial sovereignty of a foreign State and affects property which at the moment of the expropriation was subject to the territorial sovereignty of the expropriating State (territoriality principle). *Acquiescence* to foreign expropriations is restricted in this regard only by the exception for the benefit of public policy (Article *30* of the Introductory Law to the German Civil Code *EGBGB* (old version) taken in conjunction with Article *220(1)EGBGB* (new version) and Article *6 EGBGB* (new version)). This exception is only applicable, however, where and in so far as there exists a sufficient domestic connection . . . The lack of compensation for the expropriation or some other impropriety according to domestic conceptions of justice is therefore not sufficient of itself, in so far as the expropriation affects property within the territory of the expropriating State to deprive it of its effectiveness."[2]

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[1] Federal Constitutional Court, 84 *Collection of decisions (BVerfGE)*, p. 90, English translation 94 *ILR*, p. 44, GPO Annex 4.

[2] 94 *ILR*, p. 60; 84 *BVerfGE*, pp. 123-124, GPO, Annex 4, citations omitted.

93. According to the Liechtenstein Memorial, the alleged dispute concerns immovable property situated now in the Czech Republic and movable property also situated in the Czech Republic. As far as immovable property is concerned, it is clearly the position of German law that the legal status of such property is governed exclusively by Czech law.

94. As far as movable property is concerned, Liechtenstein seems to imply, without expressly saying so, that there could be an obligation under public international law on Germany to treat movable property confiscated in violation of public international law by Czechoslovakia in 1945-46, and situated at that time in Czechoslovakia, as property belonging to the former owner[1]. However, this view is mistaken. There is no rule of public international law creating any obligation for States to treat movable property confiscated in violation of public international law as property of the former owner as soon as it enters the jurisdiction of the forum State. It is well known that this issue has been decided differently by courts in different countries and has been treated extensively in the doctrine. There is broad agreement that no obligation exists under public international law to disregard the transfer of title in such cases[2].

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[1] Quite unclear in LM, p. 173, para. 6.73: "Liechtenstein had, as a minimum, a legitimate claim". The basis for that statement is not explained nor is it clear why the claim could be a claim of "Liechtenstein" rather than of the "Prince of Liechtenstein".

[2] Cf., in particular, *Oppenheim's International Law,* 9th ed., vol. I, Peace (Sir Robert Jennings and Sir Arthur Watts eds., Harlow 1992), p. 363, at p. 376, where it is stated: "However, in view of the practice of states as revealed by the actions of their courts, some of which have been prepared to acknowledge legal effects of foreign acts in violation of international law, it probably cannot be said that international law forbids courts to give effect to such foreign act when to do so is in accordance with their own national law." Cf. also Nguyen Quoc Dinh/P. Daillier/A. Pellet, *Droit International Public* (6th ed., 1999), pp. 1044 ff.

95. As regards property confiscated in 1945-46 in connection with World War II, in particular, it cannot be argued that this property must be considered as property of the former owner when it comes into a State other than the State having confiscated the property. This shows that the position taken by Liechtenstein according to which the decisions by German courts concerning the Pieter van Laer painting are proof of a change of the German attitude, is completely erroneous. Even disregarding the Settlement Convention, Liechtenstein could not rely on any rule of public international law obliging Germany to treat the property concerned as Liechtenstein property.

3. The Reparations Regime is not within the Jurisdiction of the Court ratione temporis

96. In 1945 Liechtenstein became aware of the Czechoslovak position that Liechtenstein nationals were regarded as persons belonging to the "German people"[1]. According to Liechtenstein, the inclusion of Liechtenstein property in the confiscation of assets by Czechoslovakia in 1945 for the purpose of reparations gave rise to a legal relationship between Liechtenstein and Germany which continues until today. The case brought before the Court could not be decided without judging upon the reparations regime established in 1945 and thereafter. The alleged dispute, therefore, relates to facts and legal situations prior to the entry into force of the Convention between the parties in 1980.

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[1] LM, p. 27, para. 1.17.

4. The Legal Situation of Property Confiscated in Czechoslovakia before 1980 is Excluded ratione temporis

97. Even assuming that the German position as to the confiscation of Liechtenstein property had in fact changed, which is not the case, the alleged dispute would still relate to facts and legal situations before 1980. For in a judgment concerning the alleged dispute the Court would have to judge upon the legal effect which the Czechoslovak measures in 1945 had in and outside Czechoslovakia. The Memorial of Liechtenstein states that Germany did not recognize the Czechoslovak confiscation measures but changed its position after 1990[1] or 1995[2], or 1998[3]. To decide whether this alleged change had any legal effect would require a finding on the legal situation created by the measures taken in 1945 by Czechoslovakia. This also shows that the alleged dispute relates to legal situations prior to the entry into force of the Convention between the parties.

98. The Memorial of Liechtenstein argues that the alleged change of attitude of Germany in and after 1995 – as shown before, a purposeful invention – affected the position of Liechtenstein property confiscated by Czechoslovakia in Germany and in other jurisdictions[4]. A finding on this issue would require that the Court clarify what effect the confiscation had for or in other countries.

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[1] LM, pp. 62 ff., paras. 3.15 ff.

[2] LM, p. 8, para. 3.

[3] LA, para. 21.

[4] LM, pp. 119 ff., para. 5.19 ff.; pp. 123 ff., paras. 5.26 ff.

Indeed, the lengthy discussion in the Memorial of Liechtenstein of the *Pieter van Laer Painting* case[1] shows the problem arising here very clearly. A painting confiscated in 1945 comes into Germany. Independently of the substantive question of the existence of any rules of public international law applicable in such a case[2], a decision on the Submission of Liechtenstein would require a clarification of the effects of confiscation measures by Czechoslovakia in 1945 on property being brought into other countries. This could not be done without establishing what were the legal consequences of the measures taken in 1945. Therefore, these issues are outside the jurisdiction of the Court because they relate to legal situations prior to the entry into force of the Convention as between the parties in 1980.

5. German Courts have Consistently Held that they Cannot Judge upon the Lawfulness of Czechoslovak Measures of Confiscation

99. As Liechtenstein correctly states in its Memorial, the Settlement Convention provides that no claim or action shall be admissible in German courts concerning measures of confiscation which were taken for the purpose of reparations[3]. It also correctly points out that the respective part of the Settlement Convention was maintained after the entry into force of the *Treaty on the Final Settlement with respect to Germany*[4]. The Memorial furthermore mentions that

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[1] LM, pp. 62-85, paras. 3.15-3.59.

[2] Cf. *supra*, paras. 91-95.

[3] LM, pp. 47 ff., paras. 2.31 ff.

[4] LM, pp. 49-52, paras. 2.36-2.41.

the Regional Court and the Court of Appeal of Cologne, in the *Pieter van Laer Painting* case, referred to the case law of the German Federal Court of Justice, the highest court for civil matters, which had held already more than 40 years ago that the provisions in the Settlement Convention apply to all property "seized as German assets"[1].

100. German courts consistently interpreted the Settlement Convention concluded with the three powers France, the United Kingdom and the United States as protecting all acts taken by countries like Czechoslovakia in the context of reparation measures from any legal evaluation by German courts or authorities. It is not known that any of the parties to this Convention took a different view or that Liechtenstein has approached any of those powers to argue its position. However, what is decisive in the present context is that this unchanged position is based on a legal situation prevailing since the Settlement Convention came into force on 5 May 1955, i.e., long before 1980, when Liechtenstein ratified the *European Convention for the Peaceful Settlement of Disputes*, which could not be the basis of jurisdiction for disputes concerning prior legal situations.

6. The Complete Inactivity of Liechtenstein between 1945 and 1995 Excludes the Case ratione temporis

101. Assuming that the Court were competent to decide on the legal situation prevailing between Liechtenstein and Germany as to the compensation issue

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[1] LM, pp. 64 ff., paras. 3.20 ff., cf. *supra* paras. 20 ff.

brought before it, this would require an evaluation of the fact that Liechtenstein never claimed compensation from Germany until after 1998 for the assets confiscated by Czechoslovakia. The Court would have to establish whether any legal consequences follow from this inactivity. This shows that the dispute is not within the jurisdiction of the Court because it relates to facts and legal situations prior to the entry into force of the Convention as between the parties in 1980.

102. Germany has consistently taken the position that it is not for it to pay compensation to Liechtenstein nationals for the measures taken by Czechoslovak authorities in 1945. Indeed, this was clear to Liechtenstein since the German legislation provided for compensation only to German nationals for confiscations of German property in comparable situations[1]. Liechtenstein never claimed compensation from Germany. To decide on the claim would require judging a legal situation brought about by the Czechoslovak measures, the Settlement Convention of 1955 and the German legislation, long before 1980. Therefore, the Court has no jurisdiction for this issue.

7. The Claims of Liechtenstein all Relate to Legal Facts and Situations before 1980

103. The alleged failure to respect Liechtenstein's neutrality and sovereignty[2] is outside the jurisdiction of the Court because this allegation refers to developments outside the jurisdiction of the Court that had run their full course

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[1] LM, p. 65, para. 3.21.

[2] LM, pp. 86 ff., paras. 4.1 ff.

prior to 1980[1]. A decision on these issues would require the Court to deal with events from 1945 to 1955, prior to the entry into force of the *European Convention for the Peaceful Settlement of Disputes*.

104. Liechtenstein's claim to compensation likewise concerns the interpretation of the Settlement Convention, as rightly developed in its Memorial[2]. However, this would require judging legal situations long prior to the entry into force of the Convention concerning jurisdiction in 1980.

105. Liechtenstein's claim on the basis of unjust enrichment[3] likewise relates to facts between 1945 and 1955. Clarifying a possible claim of unjust enrichment as the legal consequence of Czechoslovak confiscations which Germany had no power to hinder would require the analysis of the whole legal system of reparations concerning Germany after World War II. It is submitted that this would amount to judging a situation prior to the entry into force in 1980 of the Convention concerning jurisdiction. Therefore, this claim is outside the jurisdiction of the Court as well.

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[1] LM, pp. 87 ff., paras. 4.1 ff.; pp. 102 ff., paras. 4.32 ff.

[2] LM, pp. 109 ff., paras. 5.1 ff.

[3] LM, pp. 140 ff., paras. 6.1 ff.

Section III.

Liechtenstein's Claims Fall within the Domestic Jurisdiction of the Federal Republic of Germany

106. Germany submits that the alleged dispute as described by Liechtenstein is a dispute which by international law is solely within the domestic jurisdiction of Germany.

107. According to Article 27 (b) of the *European Convention for the Peaceful Settlement of Disputes* the Convention shall not apply to

> "disputes concerning questions which by international law are solely within the domestic jurisdiction of States".

108. As Liechtenstein argues, the decisions of German courts concerning the Pieter van Laer painting are at the basis of the case now brought before the Court. Liechtenstein also refers to "substantial arable land and forests, numerous buildings and their contents, factories etc." without substantiating the different items. The facts which are later described as basis for the decision to bring the case before the International Court of Justice are limited to the German court decisions concerning the Pieter van Laer painting and their interpretation by German authorities.

109. Liechtenstein does not dispute that the painting, when in Cologne, was fully under German territorial jurisdiction. Liechtenstein does not even allege that any rule of public international law exists which the German courts should have applied. Liechtenstein seems to assume that there is an obligation for the forum State to disregard title to property based on confiscation in violation of public

international law. However, Liechtenstein neither develops the legal basis for such a rule nor explains it in any detail. That means that Liechtenstein recognizes that the decision was a decision solely within the domestic jurisdiction of Germany, namely to apply the relevant rules of German private international law, if the Settlement Convention had not barred the German courts from deciding the case on its merits. Moreover it is evident, as Germany has shown earlier[1], that a rule of public international law which German courts should have applied in the case does not exist.

110. Of course, Germany recognizes that rules of public international law had to be respected in these decisions. The European Convention on Human Rights applies to German court procedures. The European Court of Human Rights held that the German court proceedings were fully compatible with that Convention[2]. However, that has nothing to do with the issue to be dealt with here.

111. Since Liechtenstein never explains its view why German courts, on the basis of public international law, should have decided the case brought by the Prince of Liechtenstein in his favour, Liechtenstein rather confirms that the alleged dispute, as far as this matter is concerned, is solely within the domestic jurisdiction of Germany.

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[1] Cf. *supra*, paras. 91-95.

[2] Cf. *supra*, paras. 28 f.

112. Therefore, the *European Convention for the Peaceful Settlement of Disputes* does not apply to the case, as its Article 27 (b) stipulates. This means that the International Court of Justice has no jurisdiction.

113. As far as the non-substantiated items of immovable property situated within the territory of the Czech Republic are concerned, their treatment under German private international law, assuming that German courts could have jurisdiction, is a matter solely within the domestic jurisdiction of Germany except insofar as the territorial jurisdiction of the Czech Republic has of course to be fully respected by German decisions.

114. This shows that, as far as the relationship between Liechtenstein and Germany is concerned, the alleged dispute is outside the jurisdiction of the International Court of Justice according to Article 27 (b) of the Convention. A dispute falls within the domestic jurisdiction of a State when no rules of public international law are applicable to it. This is the situation here since Liechtenstein itself does not suggest any rule of public international law to be applied by the German courts.

CHAPTER II

LIECHTENSTEIN'S CLAIMS ARE INADMISSIBLE

Section I.

Liechtenstein's Claims are not Sufficiently Substantiated

A. THE REQUIREMENT TO SUBSTANTIATE A CLAIM

115. According to Article 40, paragraph 1, second clause, of the Statute of the Court, a written application by which proceedings are instituted before the Court shall indicate "the subject of the dispute and the parties". This requirement is particularized in Article 38, paragraph 2 of the Rules of Court. Pursuant to this provision,

> "the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based."

If this requirement is not fulfilled, the action brought by the Applicant is inadmissible.

116. In the case concerning *Certain Phosphate Lands in Nauru*[1], the Court had an opportunity to emphasize the importance of substantiation. It held that Article 40, paragraph 1, of the Statute of the Court and Article 38, paragraph 2, of the

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[1] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240.

Rules of Court are essential elements of a fair proceeding "from the point of view of legal security and the good administration of justice"[1]. Indeed, if a claimant State confines itself to making vague statements, the respondent State is not in a position effectively to organize its defence. Germany finds itself in such a dire situation. Liechtenstein has submitted its Application and has expanded the reasoning contained therein in its Memorial. To date, however, Germany is not aware of the precise substance of the violations it has allegedly committed. Liechtenstein has made extensive submissions on abstract legal principles, but has remained remarkably silent on the basic facts underlying the case. Germany is therefore compelled to conclude that Liechtenstein has not fulfilled its duty to substantiate its claim. Such substantiation is a requirement determining the admissibility of an action introduced before the Court.

117. In one previous case, the Court had already to deal with a challenge by the respondent party to the claims brought by the applicant. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, Nigeria had raised the objection that the facts submitted by Cameroon provided no basis for a judicial determination that Nigeria bore international responsibility for alleged frontier incursions. In its Judgment rejecting Nigeria's preliminary objections, the Court noted that "succinct", the key word in Article 38, paragraph 2, of the Rules of Court, was not tantamount to "complete", which meant that the applicant was not prevented from later additions to the statement of the facts and

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[1] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 267, para. 69.

grounds on which a claim is based.[1] The Court also recalled that it has become an established practice for States submitting an application to the Court to reserve the right to present additional facts and legal considerations.[2] Germany does not contest the necessity of some flexibility in this regard. But there exist some minimum requirements. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court came to the conclusion that Cameroon's application contained a sufficiently precise statement of the facts and grounds on which the applicant had brought its claim[3]. This is certainly true. The present case, however, is absolutely unique in the history of adjudication in that the Applicant refrains from providing almost all of the relevant factual data. Neither can Germany as the Respondent guess what is really at stake, nor will the Court be able to grasp the essence of the case, in particular its factual dimensions. Consequently, by virtue of Article 79, paragraph 1, of the Rules of Court, the action must be declared inadmissible.

B. THE LACK OF SUBSTANTIATION AS A CONSEQUENCE OF THE CHOICE OF THE WRONG DEFENDANT

118. The lack of specific clarity characterizing Liechtenstein's Submissions is not just an accidental feature that could easily be remedied. It reflects the simple fact

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[1] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at 318, para. 98.

[2] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 318, para. 99.

[3] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 319, para. 100.

that the true respondent in the present dispute would have to be the Czech Republic as one of the successor States of the former Czechoslovakia. This elementary inference must be drawn on a first reading of Liechtenstein's Application. Rightly, Liechtenstein starts its account of the factual background by pointing out that the dispute has its origin in measures taken by the Czechoslovak State in 1945 after the Second World War[1]. For reasons which remain unexplained in Liechtenstein's Submissions, Czechoslovakia "treated the nationals of Liechtenstein as German nationals"[2]. It is well known that on that occasion, by virtue of the Beneš Decrees, Czechoslovakia deprived all persons of German or Hungarian origin or ethnicity of their assets, without ever providing any kind of reparation. Liechtenstein citizens were also subjected to that discriminatory regime of confiscation. Germany takes note of the conclusions presented by Liechtenstein in the following terms:

> "The application of the Beneš decrees to the Liechtenstein property remained an unresolved issue between Liechtenstein and Czecholosvakia until the dissolution of the latter, and it continues to be an unresolved issue as between Liechtenstein and the Czech Republic"[3].

119. It is obvious, therefore, that the pecuniary losses suffered by Liechtenstein are attributable not to Germany, but to a deliberate policy of the former Czechoslovak State. The damage caused to Liechtenstein lies more than half a

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[1] LA, para. 5.

[2] LA, para. 5.

[3] LA, para. 5.

century back in the past. The European Court of Human Rights, therefore, when it had to adjudicate the application of Prince Hans-Adam II against Germany, came to the conclusion that long before the proceedings concerning the Pieter van Laer painting, Liechtenstein had lost its title to property. It held:

> "83. The Court recalls that, according to the established case-law of the Convention organs, 'possessions' can be 'existing possessions' or assets, including claims, in respect of which the applicant can argue that he has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a 'possession' within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see the recapitulation of the relevant principles in the above-mentioned Malhous decision, with further references, in particular to the Commission's case-law).
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> 84. In the present case, the applicant brought proceedings before the German courts claiming ownership of the painting which had once belonged to his father. He challenged the validity of the expropriation carried out by authorities of former Czechoslovakia, his main argument being that the measure had allegedly been effected contrary to the terms of the Beneš Decree No. 12 and to the rules of public international law.
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> 85. As regards this preliminary issue, the Court observes that the expropriation had been carried out by authorities of former Czechoslovakia in 1946, as confirmed by the Bratislava Administrative Court in 1951, that is before 3 September 1953, the entry into force of the Convention, and before 18 May 1954, the entry into force of Protocol No. 1. Accordingly, the Court is not competent *ratione temporis* to examine the circumstances of the

> expropriation or the continuing effects produced by it up to the present date (see *Malhous v. the Czech Republic* (dec.), cited above, and the Commission's case-law, for example, Mayer and Others v. Germany, applications no. 18890/91, 19048/91, 19342/92 and 19549/92, Commission decision of 4 March 1996, Decisions and Reports 85, pp. 5-20).
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> The Court would add that in these circumstances there is no question of a continuing violation of the Convention which could be imputable to the Federal Republic of Germany and which could have effects as to the temporal limitations of the competence of the Court (see, *a contrario*, the Loizidou v. Turkey judgment (*merits*), quoted above, p. 2230, § 41)."[1]

120. It is remarkable that this judgment, which was handed down long before Liechtenstein had to submit its Memorial, is mentioned only in one single line of the Applicant's Submissions[2]. Liechtenstein has also refrained from providing it to the Court as an annex. It stands to reason that the assessment of the Strasbourg judges destroys the argument that the injury that was inflicted upon Liechtenstein could in any manner whatsoever be attributed to Germany. Quite obviously, having failed to enforce its reparation claim against Czechoslovakia and its two successor States, Liechtenstein has now started a last attempt to recover at least some of its losses from a third party which is somehow related to the implementation of a large-scale confiscation policy by Czechoslovakia to the detriment of a small State with limited means of enforcing its rights.

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[1] *Prince Hans-Adam II of Liechtenstein v. Germany*, Judgment of 12 July 2001, GPO, Annex 1.

[2] LM, pp. 13-14, para 15.

C. NO SUBSTANTIATION OF GERMANY'S ALLEGED INTERFERENCE WITH LIECHTENSTEIN PROPERTY

121. The central issue of the dispute is constituted by the allegation that Germany breached its duty under international law to respect Liechtenstein's financial interests. But neither from a look at the Application nor from a careful perusal of the Memorial does it emerge in what way, by which measure, Germany might have interfered with the Liechtenstein property which until the end of the Second World War was located in the territory of the Czecholovak State. Liechtenstein makes the most desperate efforts to demonstrate that indeed Germany may be blamed for the admittedly deplorable financial losses of its citizens. But it is not able to substantiate that Germany took measures which might be characterized as interference with Liechtenstein assets.

122. In the *Nuclear Tests* cases[1], the Court pointed out that the application "must be the point of reference for the consideration … of the nature and existence of the dispute brought before it".[2] However, Liechtenstein's Application provides only a meagre record which does not enable a reader to grasp what is really in issue. It starts out by saying[3] that "in and after 1998" the case law of German courts started treating "certain property of Liechtenstein nationals as German assets having been 'seized for the purposes of reparation or restitution, or as a result of

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[1] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 457.

[2] *Nuclear Tests (Australia* v. *France)*, p. 260, para. 24; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 463, para. 24.

[3] LA, para. 1.

the state of war'". This is a rather enigmatic formula, which does not become much clearer by the additional explanation in para. 19 of the Application where it is stated that "Germany now adheres to the position that the Liechtenstein assets as a whole were 'seized for the purpose of reparation or restitution, or as a result of the state of war'".

123. It has already been pointed out in the account of the relevant facts in Part II of the present Preliminary Objections that the thrust of the jurisprudence referred to by Liechtenstein is very simple: In the *Pieter van Laer Painting* case, no more was determined by the Oberlandesgericht Köln (Cologne Court of Appeal) and the Federal Constitutional Court than that the German judiciary was placed under a prohibition to entertain the merits of the case with which they had been seized. They derived this prohibition from Article 3, paragraph 3, of Chapter Six of the Settlement Convention, the raison d'être of which has already been explained. In other words, the German courts in the *Pieter van Laer Painting* case did not look into the substance of the matter. They made no determination on ownership, they did not rule on the permissibility under international law of the confiscatory measures carried out by Czechoslovakia in 1945 and 1946. Indeed, the Cologne Court of Appeal stated explicitly that it "refrains from any evaluation of the confiscation effected at that time"[1]. Likewise, the Federal Constitutional Court, which had to pronounce on a constitutional complaint

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[1] LM, Annex 29, vol. II, p. 289, at 306. The translation provided by Liechtenstein is mistaken as far as it refers to the author of the judgment. Erroneously, the translator speaks of the "Federal Court's Division", whereas the reference is to the Chamber of the Cologne Court of Appeal which rendered the judgment on 9 July 1996.

lodged by Prince Hans-Adam II of Liechtenstein in the same case, stressed that the civil courts in dealing with the matter had not ruled on the lawfulness of the confiscation carried out by Czechoslovakia[1]. Therefore, in its decision of 28 January 1998 it confined itself to reviewing the lawfulness of the denial of judicial remedies imposed on Germany by the conventional obligation enunciated in the Settlement Convention, concluding that no violation of German constitutional law could be found. No word was said by the German courts on the substantive issue of ownership. Therefore, in good faith no conclusions can be drawn from the jurisprudence with regard to Germany's position regarding the confiscatory measures carried out to the detriment of Liechtenstein property on the basis of the Beneš Decrees.

124. The approach taken by the German courts to the claim brought by Prince Hans-Adam II von Liechtenstein was explicitly approved by the European Court of Human Rights. As pointed out, it denied the existence of any kind of interference by Germany with the Prince's property, given the fact that his claim had long since ceased to constitute an effective legal position.

D. DISTORTION OF THE GERMAN CASE LAW CONCERNING THE SETTLEMENT CONVENTION

125. Liechtenstein seeks to distort the plain meaning of the proceedings which its ruling Prince had initiated in Germany to recover the Pieter van Laer painting by

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[1] See LM, Annex 32, vol. II, p. 353, at 355.

all means at its disposal. The first one of these misleading statements can be found on page 13 of the Memorial[1], where Liechtenstein points out that the Federal Constitutional Court held that by virtue of the Settlement Convention the German courts had "to treat the painting as the property of the Historic Monuments Office" in the Czech city of Brno. Anyone reading the decision of the Federal Constitutional Court of 28 January 1998 will easily find out that the reasons of that decision do not even mention Czechoslovakia or the relevant Czech institution, the Historic Monuments Office in Brno, which today claims to be the legitimate owner of the painting. Explicitly, the Federal Constitutional Court states in a disclaimer that the issue of expropriation is not before it[2].

126 On page 14 of its Memorial, Liechtenstein goes one step further by saying that Germany "claims that it is *entitled* to treat the Liechtenstein property as property 'seized for the purpose of reparation or restitution, or as a result of the state of war'"[3]. Progressively, the Memorial changes the plain meaning of the propositions derived in the case law from the Settlement Convention, trying to suggest that there was indeed some kind of interference. At page 88 of the Memorial[4], it is contended that Germany declared "Liechtenstein property to be German property" – something which the authors of the Memorial are of course not able to sustain by a proper documentary source. The line of distortion is

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[1] LM, para. 13.

[2] Section II 1 of the Judgment, LM, Annex 27, vol. II, p. 250.

[3] LM, p. 14, para. 16, emphasis added.

[4] LM, para. 4.1.

driven to a first extreme at page 89[1] where, without any hesitation, it is submitted that Germany pretended to be entitled "to use neutral property (such as Liechtenstein property) to meet its duty of reparations". Indeed, this unfounded allegation comes to its culmination at page 90[2], where Liechtenstein contends that Germany included Liechtenstein property in its reparations regime and that it treated Liechtenstein nationals as nationals of a belligerent State.

127. These baseless assertions are continued in the following. They constitute the *leitmotif* of Liechtenstein's line of argument. Again, at page 110 of the Memorial[3], the reader is confronted with the incorrect statement that Germany declared the property of Liechtenstein nationals "to be German property which could be used for reparation purposes". The Memorial even goes so far as to contend that the position taken by the German courts "entailed a final loss of the title to property being subject to reparation measures", and the concluding phrase "so far as Germany is concerned" does not make things much better. By all means at its disposal Liechtenstein seeks to hide the basic fact that in 1945-46, by a sovereign act of the Czechoslovak State, its citizens were deprived of their assets and that this state of affairs has continued ever since.

128. It is even more amazing to note that Liechtenstein extends the consequences which it draws from the *Pieter van Laer Painting* case to all the property held at

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[1] LM, para. 4.4.

[2] LM, para. 4.6.

[3] LM, para. 5.1.

the end of the Second World War by Liechtenstein citizens in the territory of the former Czechoslovakia. Again, this is a pure invention of the authors of the Application and the Memorial. However, the Memorial defends this position as from its very outset. At page 8[1], it is stated that Germany has classified "all the Liechtenstein property" as having been seized for purposes of reparation or restitution, and the same is repeated, for instance, at page 100[2].

129. This bold assertion is not supported by any piece of evidence. It is true that if a dispute concerning the land formerly owned by Liechtenstein citizens ever came before a German court that court would have to decline jurisdiction to rule on the merits of the case. But not a single dispute of that kind has effectively been brought to Germany for adjudication, and it is difficult to see how German courts could be competent for ruling on ownership of real estate in a foreign country. It is just by chance that the Pieter von Laer painting was encountered in Germany in 1991, where it was shown within the framework of an art exhibition. Germany has no actual relationship with all the other assets which are today located in the Czech Republic or in Slovakia.

130. In sum, Germany concludes that Liechtenstein has truly invented an interference which in fact has never occurred. Such a product of fantasy cannot be deemed to meet the requirements of substantiation as they are enshrined in Article 40, paragraph 1, of the Statute and Article 38, paragraph 2, of the Rules of Court.

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[1] LM, para. 3.

[2] LM, para. 4.24.

E. A FAILING ATTEMPT AT DIPLOMATIC PROTECTION

131. Essentially, Liechtenstein's claim must be classified as exercise of diplomatic protection in favour of its nationals allegedly injured by Germany. Liechtenstein seeks to obtain financial reparation for the losses suffered by the victims of the confiscatory measures carried out by the former Czechoslovakia and maintained by the Czech Republic. Therefore, it should be crystal clear who the persons are who sustained injury at the hands of the Czechoslovak State. As far as Germany is concerned, Liechtenstein would at least have to indicate the persons included in the adversely affected group. In this regard, the Application evinces a total lack of precision. Even the Memorial does not bring about the necessary clarity.

1. No Indication of the Victims

132. The Application refers to the identity of the victims in the most cavalier fashion. It limits itself to stating[1] that "the property of the then Prince of Liechtenstein and of his family as well as of other Liechtenstein nationals" was seized. Hardly could this point be dealt with more negligently. On the basis of the Application, one knows no more than that the Prince and his family lost some of their property, all that was located in the territory of the former Czechoslovakia. Obviously, such a blanket statement is not enough as substantiation of the claim raised. On the basis of the Application alone, Germany would not have had enough elements for its defence. In instances of diplomatic protection, it is the

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[1] LA, para. 5.

individual person who counts. Claims cannot be brought on an aggregate basis, without any identification of the alleged individual victims.

133. Nor does the Liechtenstein Memorial make any great effort to enlighten Germany on who allegedly was hurt by the confiscatory measures taken by Czechoslovakia at the end of World War II. The first indication can be found at page 8[1]. Liechtenstein contends that "about 38" of its nationals were adversely affected as owners of property, "including the then Prince of Liechtenstein and members of his family". At page 27, first of all a fairly vague reference is made to "a number of Liechtenstein families" which "had lived in Bohemia and Moravia for several centuries"[2]. The reader is denied precise information even in the next paragraph in which Liechtenstein explains that in 1945 it drew up "a list of families affected by the confiscation measures of the then Czechoslovak government". This list[3], Germany must assume, is a list of persons of whom most, if not all, are dead by now. There is certainly no need to emphasize that 1995 is at a distance in time of 50 years from 1945. Thus, the Applicant has failed to specify for whom Liechtenstein wishes to exercise a right of diplomatic protection.

134. A number of conclusions may be drawn from the list provided by Liechtenstein, all of which confirm that the action is inadmissible.

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[1] LM, para. 2.

[2] LM, para. 1.18.

[3] LM, Annex 8, vol. I, p. 32.

135. First of all, the list makes clear once again that the only actual interference with the Liechtenstein property, which undoubtedly took place, was effected by Czechoslovakia in 1945. Annex 8 of the Memorial is intended to identify the victims of loss of property, and indeed the list may accurately reflect the situation as it existed in 1945 after the Czechoslovak Government had decided to equate Liechtenstein nationals with German nationals. Quite obviously, Liechtenstein is of the view that the damage was caused in 1945. The simple fact that it did not think of revising the list of 1945 makes abundantly clear that essentially it does not really believe that in 1995 Germany's so-called "change of position" caused any new injury. Therefore, rightly, it did not bother to find out who might have been affected in 1995. For Liechtenstein itself, 1995 is an absolutely irrelevant date. In any event, to date Germany has no clues who, apart from the ruling Prince himself, in 1995 believed to have property claims against the Czech Republic which, allegedly, were brought to extinction by the jurisprudence of the German courts.

136. Germany has noted, furthermore, that the 1945 list contains names which are well known to the Court. It contains the name of "Nottebohm" twice. Harriet Nottebohm and Hermann Nottebohm are said to be among the victims of the confiscation measures carried out by the Czechoslovak authorities in 1945. It would have been necessary for Liechtenstein to substantiate in detail that it is entitled to rely on the nationality of those two persons, for the purpose of diplomatic protection, given the fact that almost half a century ago the Court

formally denied it the right to do so with respect to another member of this very family[1].

137. In sum, Liechtenstein has failed to demonstrate that the right to diplomatic protection which it invokes does in fact exist. Not only has it failed to provide the evidence which would be necessary for that purpose, it has furthermore not even furnished the tiniest shred of evidence that, apart from the family of the Prince himself, there are Liechtenstein individuals who have suffered injury at the hands of German authorities in 1995.

2. No Indication of the Assets Allegedly Affected

138. The same kind of negligence can be observed concerning the assets which allegedly were damaged by Germany's "change of position". In order to bring its claim in line with the obligations laid down in Article 40, paragraph 1, of the Statute and Article 38, paragraph 2, of the Rules of Court, the Applicant would have had to give an account of the property which, in the view of Liechtenstein, can be deemed to form the subject-matter of the present dispute. However, again the most complete lack of precision obtains. Liechtenstein confines itself to a limited number of vague assertions concerning the assets which were held by its citizens in the territory of the former Czechoslovakia in 1945.

139. The Application provides an account of the assets concerned in a way which remains unspecific, even nebulous. Paragraph 5 speaks of "substantial arable

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[1] See *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4.

land and forests, numerous castles and their contents, factories etc.". No more details can be gleaned from this first piece of the pleadings. In the following, Liechtenstein just focuses on the Pieter van Laer painting[1]. Although it stresses in paragraph 20 that the dispute "exists generally with respect to the Liechtenstein property" and "is not limited to the van-Laer painting", not a single word is lost on the specification of, for instance, the "castles" allegedly owned by the 38 persons. No hint as to the location of these castles can be found. No names are given. The phrase reproduced at the beginning of the present paragraph remains the only hint that real estate of scale may be in issue. But: no clear inferences can be drawn, the Respondent can do no more than guess.

140. One might have expected that Liechtenstein would use the opportunity provided by Article 45 of the Rules of Court to complement its pleadings by a memorial, to explain its argument in more detail. Even a cursory glance at the Memorial shows, however, that Liechtenstein has not remedied the flaws of the Application. The Memorial is of the same superficiality concerning the financial damage which Liechtenstein alleges to have suffered. Again, no details are given. By perusing the Memorial, the reader learns nothing about the extent of the injury which Liechtenstein suffered directly by the Czechoslovak measures and claims to have suffered "par ricochet" through Germany's "change of position".

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[1] LM, pp. 14 ff., paras. 17 ff.

141. At page 8 of the Memorial[1], Liechtenstein simply repeats the formula that the property in question included "substantial arable land and forests, numerous buildings and their contents, factories etc.". The only remarkable modification of the earlier statement of facts is that the castles have disappeared and have been replaced by "buildings". At page 27[2], another blanket statement is made. Liechtenstein contends that the victims of the confiscation measures by Czechoslovakia owned "extensive agricultural and forestry property, houses, livestock and equipment used in agriculture, personal furniture and fittings and other valuables, as well as interests in agricultural and industrial business". At page 28[3] the castles make a fresh entry. Liechtenstein submits that the family of the Prince of Liechtenstein owned not only "large forests and agricultural lands", but also "several castles which were home to an important art collection". Even the most eager study of the Memorial is unable to unearth any further details. Only indirectly is it possible to learn something more about the losses of the then Reigning Prince of Liechtenstein, Franz Josef II. The judgment of the Administrative Court in Bratislava of 21 November 1951 gives a short list of agricultural property confiscated in a number of districts of the Czechoslovak territory.[4] Even this list of names of districts is fundamentally lacking in precision. And it remains that as far as the other persons on the "list of 38" are concerned, the balance sheet of information can be described as zero.

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[1] LM, para. 2.

[2] LM, para. 1.18.

[3] LM, para. 1.20.

[4] LM, Annex 9, vol. I, p. 34.

142. It stands to reason that an action which claims reparation for financial losses, but which totally refrains from substantiating these losses cannot prosper. It is true that Germany raises Preliminary Objections in the present Memorial with the aim of having the Court abstain from going into the details of the merits of the case. If Germany had not done so, however, it would not have been able to respond to the allegations made in an adequate fashion. In instances of diplomatic protection, the person who has allegedly suffered injury and the assets which have allegedly been affected play the central role. Neither one of these two elements, however, has been duly identified by the Applicant. As far as the merits of the case are concerned, Germany is simply unable to provide any comments that would clarify the matter. The allegations put forward by Liechtenstein are so vague and lack precision to such a great extent that the duty of substantiation must be deemed not to have been fulfilled. The Application is therefore inadmissible.

F. NO VIOLATION OF LIECHTENSTEIN'S NEUTRALITY AND SOVEREIGNTY SUBSTANTIATED

143. In order to give its claim a better basis than it actually has, Liechtenstein contends additionally that it was not only damaged in an indirect fashion by Germany in the person of its (unidentified) nationals, but that it also suffered direct damage through the conduct of German authorities, primarily its courts. It claims that Germany violated its sovereignty as an independent third State as well as its status of neutrality during the Second World War. Both allegations are again pure figments of imagination, for which Liechtenstein has not been able to produce any kind of substantiation. All that the reader can find in the

Application and the Memorial are blanket allegations, unsupported by any coherent statement of facts. As such, these allegations lack the necessary specificity, too. They do not meet the standards laid down in Article 40, paragraph 1, of the Statute and of Article 38, paragraph 2, of the Rules of Court.

1. Liechtenstein's Neutrality

144. In the Application, no trace can be found of the argument that Germany breached Liechtenstein's neutrality. This argument comes up for the first time in the Memorial. In the opening paragraph of Chapter 4[1], Liechtenstein asserts that "by declaring Liechtenstein property to be German property, Germany failed to respect Liechtenstein's acknowledged status as a neutral State during World War II, as well as infringing [*sic!*] its sovereignty". On the following pages, one can find many abstract explanations on the law of neutrality.[2] Germany acknowledges that this exposition as such accurately reflects positive international law. However, Liechtenstein has nothing of relevance to say about "Germany's violation of the law of neutrality"[3]. It rightly points out that a reparations regime cannot be extended to the assets of a neutral country, neither by the victorious powers nor by the defeated nation. But instead of concluding that, hence, Czechoslovakia breached its obligations under international law, Liechtenstein submits that there was a breach by Germany of Liechtenstein's neutrality.

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[1] LM, p. 88, para. 4.1.

[2] LM, pp. 91-97, paras. 4.9-4.28.

[3] LM, pp. 98-101, paras. 4.19-4.28.

145. In attempting to discover the factual basis of that bold thesis, the reader is again referred to the decision of the Federal Constitutional Court of 28 January 1998[1], which is interpreted as a denial of the "Liechtenstein nationality of these [unidentified] persons" and as an attempt to regard them "as German nationals for the purposes of the reparations regime"[2]. In other words, Liechtenstein is not able to identify a single act which might be able to be taken as actual interference with Liechtenstein property. As shown, the decision of the Federal Constitutional Court explicitly refrained from making a ruling on the lawfulness of the confiscation strategy pursued by Czechoslovakia to the detriment not only of persons of German or Hungarian ethnicity, but also of Liechtenstein citizens. It confined itself to stating that German constitutional law did not stand in the way of the prohibition, laid down in Article 3, paragraph 3, of Chapter Six of the Settlement Convention, to entertain claims seeking to challenge measures taken after World War II for the purpose of reparation or restitution. No more than this purely procedural point was determined by the Federal Constitutional Court, which thus confirmed the stance taken earlier by the ordinary courts in Cologne which Prince Hans Adam II of Liechtenstein had seized. Neither the German courts nor the German executive branch have ever taken the position that Liechtenstein property was German property. In other words, the allegation as presented by Liechtenstein constitutes a most serious distortion of the facts. To sum up, there is no shred of evidence susceptible of sustaining the contention

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[1] LM, Annex 32, vol. II, p. 353.

[2] LM, pp. 100 ff., para. 4.28.

that Germany included Liechtenstein property in a reparations regime which in 1995 simply did not exist. The violation of Liechtenstein's neutrality remains therefore a lawyers' construct, a thesis which has no foundation. An allegation which lacks any inherent logic and thus constitutes a mere product of imagination is not only ill-founded, it must be dismissed as being inadmissible.

146. Given this totally erroneous premise, it is clear from the very outset that the legal inference drawn therefrom must also be wrong. But Liechtenstein's argument is also wrong on legal grounds. Neutrality governs relations between States in times of armed conflict. According to the words of a renowned authority in the field, the late Swiss lawyer Rudolf Bindschedler, who himself put into practice neutrality as legal advisor of his country , the term "neutrality" "designates the legal status of a State which does not participate in a war being waged by other States".[1] It is clear from the submissions of Liechtenstein itself that during World War II Germany never acted contrary to its obligation to respect the status of neutrality which Liechtenstein had chosen. According to the submissions of the Applicant, the dispute came into being in 1995, that is to say 50 years after the end of World War II. The parties are in agreement – and it is fairly obvious – that in 1995 no situation of armed conflict existed in the relations between any one of the States involved – Liechtenstein as the Applicant, Germany as the Respondent, the Czech Republic as one of the successor States of Czechoslovakia, the State which in 1945 deprived

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[1] R. Bindschedler, 'Neutrality, Concept and General Rules', in: III *Encyclopedia of Public International Law* (R. Bernhardt ed., Amsterdam *et al.* 1997), p. 549.

Liechtenstein citizens of their property, and the Three Western Powers, which through the Settlement Convention imposed on Germany the obligation not to accept as admissible claims seeking to challenge any measures of reparation or restitution. Disputes arising between States who peacefully coexist with one another have nothing to do with the special rules on neutrality. These rules are needed to cope with the suspension as between the warring parties of many of the common rules which govern relationships between States in times of peace. Almost inevitably, in an indirect fashion, third States are also affected by an armed conflict between two or more other States. For that reason, it was necessary to bring into being a special body of rules, the law of neutrality. For events and occurrences in times of peace, however, the rules on neutrality provide no answers. Any issues can be resolved by the common rules of international law. In that regard, it is clear, above all, that no State has a right to violate the rights of third States under any pretext whatsoever. Germany unreservedly agrees with Liechtenstein that war and measures taken after an armed conflict to settle the financial consequences resulting therefrom should in no way affect the rights of States that have remained neutral. This is a rule inherent in the principle of sovereign equality. But the fact is that Germany has not engaged in any conduct which might reasonably be interpreted as violating the rights of Liechtenstein.

2. Liechtenstein's Sovereignty

147. The preceding considerations have already answered the allegation that Germany violated the sovereignty of Liechtenstein. Once again Germany fully agrees with Liechtenstein concerning the point of departure. All States are

entitled to see their sovereignty respected, no matter how large or small they are. For a small State like Liechtenstein sovereign equality is even more important than for a big State which may rely on its factual strength to defend its rights and interests. And yet, the application of this legal premise to the facts in the instant case lacks again any reasonable foundation. Liechtenstein comes back to its interpretation of the decision of the Federal Constitutional Court of 28 January 1998[1] as constituting the act from which originated the damage complained of.

148. The very core of Liechtenstein's complaint is as simple as it is hard to understand. Without hesitation, Liechtenstein submits that through its "change of position" Germany treated Liechtenstein nationals "like its own nationals"[2]. Liechtenstein even goes as far as stating that "this equal treatment amounts to a *de facto* involuntary conferment of nationality without any reasonable relationship of the Liechtenstein nationals to Germany"[3]. In fact, this allegation is not just a slip of the tongue. Liechtenstein insists that the effects of the position taken by Germany in and after 1995 "are comparable, *pro tanto*, to those of a forced imposition of nationality"[4].

149. Germany not only rejects this allegation in the most resolute manner, but submits that again Liechtenstein has come to its conclusions by deliberately

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[1] LM, Annex 32, vol. II, p. 353.

[2] LM, p. 103, para. 4.34.

[3] LM, p. 104, para. 4.35.

[4] LM, p. 106, para. 4.40.

distorting the meaning of the jurisprudence of the German courts seized with adjudicating the claim brought by Prince Hans-Adam II in the *Pieter van Laer Painting* case. By no stretch of the imagination can it be derived from the decisions of these courts that Germany, by a sovereign act, forcibly imposed its nationality on a given number of Liechtenstein citizens. It is particularly interesting to note in this connection that Liechtenstein has not been able to indicate who the "victims" of that hidden naturalization policy could be. As already shown, there exists the most absolute mystery concerning the persons who might have been affected by an indirect conferment of German nationality. In any event, Germany is not aware of any act of almost annexionist connotation, and it has not been able to detect the bases supporting such a harsh indictment in Liechtenstein's Memorial.

G. CONCLUSION

150. All in all, Liechtenstein acted with the utmost carelessness in formulating its allegations, not refraining even from purposeful distortions of the facts which constitute the basis of the present case. Not a single one of the relevant allegations brought is supported by specific substantiation. Again and again, Liechtenstein invokes the decisions rendered by the German judiciary in the *Pieter van Laer Painting* case by attributing to them a meaning which they do not have and have never had. On the other hand, it withholds from the Court important information, namely the judgment of the European Court of Human Rights which found that Germany's conduct in the *Pieter van Laer Painting* case was unobjectionable from the viewpoint of the European Convention on Human Rights. Consequently, Germany holds that the Application brought by

Liechtenstein should not be examined by the Court as to its merits, but must be dismissed *a limine*. An action the legal foundations of which even the Applicant himself is unable to substantiate should not unnecessarily obstruct the agenda of the Court.

Section II.

Liechtenstein's Claims Require the Court to Pass Judgment on the Rights and Obligations of the Czech Republic in Its Absence and without Its Consent

151. Germany's fifth preliminary objection concerns the absence of the successor States of Czechoslovakia, in particular the Czech Republic from the present proceedings. As Germany has maintained above[1], there exists no dispute between the parties concerning the issues brought by Liechtenstein before this Court. But even if the Court reached the conclusion that in regard to these issues there was a dispute between Liechtenstein and Germany, the Court could not exercise jurisdiction due to the so-called indispensable third party rule.

152. According to the principle of consent which constitutes the very foundation of the jurisdiction of the Court, the Court cannot sit in judgment over the behaviour of a State which has not given such consent. In the present case, the Court cannot make a legal determination of the behaviour of Germany without, at the same time, judging the behaviour of the Czech Republic, first, concerning the

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[1] See *supra*, Chapter I, Section I, paras. 35 ff.

existence *vel non* of any claims for reparations between Germany and the Czech Republic, and second, as to the lawfulness of the conduct of its predecessor State, Czechoslovakia, regarding the seizure of property belonging to Liechtenstein and its nationals. The Czech Republic thus being an indispensable third party to this case, the Court needs the consent of the Czech Republic to proceed with it. But the Czech Republic has neither made a declaration according to the Optional Clause accepting the compulsory jurisdiction of the Court, nor is it a party to the *European Convention for the Peaceful Settlement of Disputes* of 29 April 1957, nor has it given its consent to the present proceedings on an *ad hoc* basis. Thus, in the absence of the Czech Republic, the Court lacks jurisdiction.

153. In the following, Germany will show that

(1) the principle of consensual jurisdiction requires the sovereign consent of an indispensable third party, that is, a party whose conduct is the very subject-matter of a case before the Court,

(2) the Czech Republic is an indispensable third party in the present case, both

- (a) regarding the lawfulness *vel non* of the seizures of Liechtenstein property in the former Czechoslovakia, and
- (b) regarding the existence of an enrichment of any kind of Germany, as claimed by Liechtenstein.

Thus, Germany concludes

(3) that the Czech Republic is an indispensable third party in the present proceedings, in whose absence the Court lacks jurisdiction over the case,

(4) that this matter is exclusively preliminary in character and should therefore be decided in the phase of the proceedings dealing with Germany's Preliminary Objections.

Therefore, Germany asks the Court to decline to decide on the merits of the present case.

A. THE COURT CANNOT EXERCISE JURISDICTION OVER AN INDISPENSABLE THIRD PARTY WITHOUT THAT PARTY'S CONSENT

154. In the statutory regime of the jurisdiction of the Court, the most fundamental principle is that of consent. To recall Article 36 of the Statute:

> "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

155. Both in regard to cases referred to the Court by special agreement of the parties and in those arising under a convention or treaty, States have established the jurisdiction of the Court on a strictly consensual basis. The system of the Optional Clause embodied in Article 36, paragraph 2, of the Statute confirms this principle. Thus, in the case of the *Monetary Gold Removed From Rome in 1943*, it was emphasized that "the Court can only exercise jurisdiction over a State with its consent."[1] This basis of the rule of the "indispensable third party"

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[1] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32.

should be kept in mind when dealing with the question of jurisdiction of the Court in the present instance.

156. As is well known, the Court applied the principle of the indispensable third party first in the *Monetary Gold* case just referred to. It was brought before the Court by an Application of Italy against France, the United Kingdom and the United States. Italy requested the Court to decide certain legal questions concerning a quantity of monetary gold removed from Rome by the Germans in 1943, recovered in Germany but which belonged to Albania. Both Italy and the United Kingdom claimed to be entitled to the gold as compensation for breaches of international law on the part of Albania. The Government of Albania, however, had not consented to the jurisdiction of the Court in the matter. In order to decide which State was entitled to claim the gold, the Court needed first to determine whether Italy had a claim to compensation vis-à-vis Albania. In the absence of Albania's consent, however, the Court declined to do so. Due to the pertinence of this case, the reasoning of the Court in *Monetary Gold* deserves to be cited at length:

> "In order ... to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation. In order to decide such questions, it is necessary to determine whether the Albanian law of January 13th, 1945, was contrary to international law. In the determination of these questions – questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy – only two States, Italy and Albania, are directly interested. To go into the

> merits of such questions would be to decide a dispute between Italy and Albania.
>
> The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."

And further:

> "In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania."[1]

157. The similarity of the position of the three States involved in *Monetary Gold* to that of Liechtenstein, Germany and the Czech Republic in the present instance is striking, indeed this position almost completely coincides. One would only have to change some words in the passages from *Monetary Gold* just quoted to render this apparent. Thus, if, for the sake of illustration, we apply the reasoning in *Monetary Gold* to the present case, it would go as follows:

158. In order to determine whether Liechtenstein is entitled to receive reparation for the damage it has suffered, it is necessary to determine whether Czechoslovakia

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[1] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32.

has committed any international wrong against Liechtenstein. In order to decide such questions, it is necessary to determine whether the so-called Beneš Decrees were contrary to international law. In the determination of these questions – questions which relate to the lawful or unlawful character of certain actions of Czechoslovakia vis-à-vis Liechtenstein – only two States, Liechtenstein and Czechoslovakia, are directly interested. To go into the merits of such questions would be to decide a dispute between Liechtenstein and Czechoslovakia. The Court cannot decide such a dispute without the consent of the successor State to Czechoslovakia, the Czech Republic. But it is not contended by any Party that the Czech Republic has given its consent in this case either expressly or by implication. To adjudicate upon the international responsibility of the Czech Republic without its consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent. In the present case, the Czech Republic's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of the Czech Republic.

159. So far Germany's demonstration of what could almost be called an identity of the position of the States involved in *Monetary Gold* and in the present case, and thus of the indispensability of the Czech Republic for the present proceedings.

160. In its jurisprudence, the Court has frequently referred to the *Monetary Gold* precedent ever since. Of the range of cases[1], only two require further analysis as to their incidence on the present litigation: the first one as an example where the Court has refused to apply the rule: the case concerning *Certain Phosphate Lands in Nauru*[2], and the second one as the prime example of the continuing validity of the rule: the case concerning *East Timor*[3].

161. In the *Nauru* case, the Court was faced with a situation related to, but – on one decisive point – differing from the *Monetary Gold* precedent. The respondent in this case, Australia, had argued that both the United Kingdom and New Zealand were indispensable third parties because they had been part of the Administering Authority over Nauru as well and thus were in the same position as Australia. The Court used the opportunity both to confirm the *Monetary Gold* rationale and to limit its scope to cases in which the interests of the third State were the very subject-matter of the dispute between the parties before it. First, the Court confirmed the consensual nature of its jurisdiction and thus the rationale of *Monetary Gold*:

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[1] See, e.g., *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment,I.C.J. Reports 1984*, p. 25, para. 40; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 430, para. 88; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, pp. 116, 122, paras. 56, 73.

[2] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240.

[3] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90.

> "National courts, for their part, have more often than not the necessary power to order *proprio motu* the joinder of third parties who may be affected by the decision to be rendered … . But on the international plane the Court has no such power. Its jurisdiction depends on the consent of States"[1].

The absence of intervention by a third State, however, did not preclude

> "the Court from adjudicating upon the claims submitted to it, provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for."[2]

162. In the *Nauru* proceedings this was not the case. The Court thus distinguished *Nauru* from the *Monetary Gold* rationale by differentiating between the case in which the legal determination of the behaviour of third States is a *prerequisite* for a judgment of the Court and the case where it is a mere incidental *implication*. In the latter case, a third party is protected by the limitation of the binding force of the Court's decisions to the parties (Article 59 of the Statute); in the former case, the third party is indispensable. In the words of the Court:

> "[T]he determination of Albania's responsibility [in *Monetary Gold*] was a *prerequisite* for a decision to be taken on Italy's claims. … In the present case [Nauru], the determination of responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim. … [A] finding by the Court

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[1] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 260, para. 53.

[2] *Certain Phosphate Lands in Nauru*, p. 261, para. 54.

> regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction."[1]

Therefore, the decisive point is whether the third party's interest is the very subject-matter of the dispute, that is, whether it needs to be decided upon as a prerequisite for the decision on the case brought by the Applicant.

163. In the case of Liechtenstein, the result of this inquiry is obvious, as Germany will explain further in the following chapter: In order to be able to determine (1) the unlawfulness of the alleged German recognition of the Czechoslovak seizures, and (2) the existence *vel non* of any enrichment by Germany, the Court needs in the first place to legally qualify the conduct of a sovereign third State, namely Czechoslovakia, respectively its successor States, in particular the Czech Republic. Only following such a decision on the lawfulness of Czechoslovak conduct would the Court be able to decide on Liechtenstein's claims against Germany. Hence, the condition that a party is indispensable if a decision on its conduct is a prerequisite to the decision of the case before the Court, and thus concerns the very subject-matter of the dispute, is fulfilled in the present case.

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[1] ***Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 261-62, para. 55 (Emphasis added).**

164. In the other leading case on the indispensability of a third party, *East Timor*, the Court again recalled the principle of consensual jurisdiction.[1] The case concerned the permissibility of Australia concluding a treaty with Indonesia on the continental shelf resources of East Timor. And again, the Court emphasized that, if it is impossible to separate the behaviour of the applicant and that of the third State, the third State is an indispensable third party. In the words of the Court:

> "The Court has carefully considered the argument advanced by Portugal which seeks to separate Australia's behaviour from that of Indonesia. However, in the view of the Court, Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia."[2]

And the Court further observed:

> "[T]he effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued

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[1] *East Timor (Portugal* v. *Australia), I.C.J. Reports 1995*, p. 100, para. 26.

[2] *East Timor (Portugal* v. *Australia), I.C.J. Reports 1995*, p. 101, para. 28. See also *ibid.*, para. 29, *ibid.*, p. 104, para. 33; *ibid.*, p. 105, para. 34.

> presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the 'well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent' (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32)".[1]

165. Following this line of argument in the present case, the Court cannot pronounce upon the question of compensation for the seizure of Liechtenstein property by Czechoslovakia without qualifying the Czechoslovak acts as lawful or unlawful.

166. The jurisprudence of the Court concerning the indispensability of third parties is crystal clear: If the legal interests of a third State constitute the "very subject-matter" of a dispute brought to the Court and the third State is absent from the proceedings, the Court cannot exercise jurisdiction on the matter. Legal interests of a third State do constitute the very subject-matter of a dispute if the Court cannot decide on the claims before it without prior determination as to the rights or obligations of the third State.

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[1] *East Timor (Portugal* v. *Australia), I.C.J. Reports 1995*, p. 105, para. 34.

B. THE CZECH REPUBLIC IS AN INDISPENSABLE THIRD PARTY TO THE PRESENT CASE

167. The Czech Republic is an indispensable third party to the present case in two respects:

(1) The Czech Republic is an indispensable third party concerning the question of the lawfulness of the Beneš Decrees. The Court simply cannot decide on any claims of unlawful recognition of foreign confiscations or unjust enrichment on the part of Germany without passing judgment on the Czechoslovak seizures of Liechtenstein property.

(2) Germany could only be enriched by any action taken after 1980 if it were under an obligation to pay reparations to the Czech Republic as a successor State of Czechoslovakia. But again, this matter cannot be decided upon without the presence of the alleged holder of the rights to reparations or compensation against Germany, namely the Czech Republic.

1. The Czech Republic is an Indispensable Third Party Regarding the Unlawfulness of Seizure of Liechtenstein Property on Czechoslovak Territory

168. Liechtenstein cannot deny that a legal assessment by the Court of the Czechoslovak seizures of Liechtenstein property is a prerequisite of any decision on the merits of Liechtenstein's claims. It is striking that Liechtenstein itself apparently regards a determination by the Court as to the unlawfulness under international law of the Beneš Decrees to be such a prerequisite. As the Liechtenstein Memorial asserts:

> "[U]ntil the mid 1990s, Germany had consistently *regarded the 'Beneš Decrees' as contrary to international law. Under this situation, there was no question of Germany's enrichment*: the Respondent State rightly considered that the Liechtenstein nationals' assets were not part of the reparations regime and could not, therefore, be deducted from the debt it owed to Czechoslovakia on this account."[1]

169. Hence, even according to Liechtenstein's own view, the question of German enrichment as alleged could not be decided upon without prior determination of the lawfulness *vel non* of the conduct of a sovereign, but absent third State. Germany neither profited from unlawful acts of Czechoslovakia, nor can it be made responsible for unlawful acts of a third State.

170. Liechtenstein goes on to claim that Germany has changed its position, and alleges that Germany now regards the application of the Beneš Decrees to Liechtenstein property as being in conformity with international law:

> "The picture changed completely when Germany contended, following the Pieter-van-Laer case, that the Liechtenstein nationals' assets confiscated by Czechoslovakia had been rightly treated as German assets, as defined by the reparations regime."[2]

In yet another repetition of the purposeful invention of an alleged "change of position", this description again distorts any possible reading of the *Pieter van Laer Painting* case beyond recognition. As Germany has repeatedly emphasized, the *Pieter van Laer Painting* case concerned the question of jurisdiction of German courts, and nothing else. In no way can it be taken as any substantive recognition of the lawfulness of the seizure of property of Liechtenstein nationals. Liechtenstein persistently fails to properly distinguish between the question of jurisdiction of domestic courts and the question of the merits of a legal claim brought before them.

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[1] LM, p. 156, para. 6.41, emphasis added.

[2] LM, p. 156, para. 6.41.

171. In the context of the indispensable third party rule, however, Liechtenstein's line of argument is relevant: A finding as to the unlawfulness of the alleged German recognition of the Czechoslovak takings presupposes a finding on the lawfulness of these very measures – a finding which can only be made in the presence of a sovereign third State, namely the Czech Republic as the relevant successor State of Czechoslovakia.

172. All of Liechtenstein's other charges – the alleged disregard for the property of its nationals and the allegedly ensuing violations of its sovereignty and neutrality – likewise depend on a finding upon sovereign acts of a third State, namely the seizures of Liechtenstein property by Czechoslovakia – again, a decision which cannot be made in the absence of Czechoslovakia, respectively its successor States.

173. Liechtenstein apparently tries to avoid this conclusion by changing the emphasis from the issue of the lawfulness of the Beneš Decrees as such to that of a German recognition of their effects. That is why it constructs – or, rather, invents – the "change of position" which would, in the face of all the facts ranging from the statement of the then Federal Chancellor Helmut Kohl to the German-Czech 1997 Declaration, transform this case from one between

Liechtenstein and the Czech Republic to one solely between Liechtenstein and Germany. But even if the question is thus put in "subjective" terms, the Court cannot avoid a prior – objective – determination of the conduct of a sovereign but absent third State. Thus, according to the *Monetary Gold/East Timor* doctrine, the Court cannot exercise jurisdiction in the present case.

2. The Czech Republic is an Indispensable Third Party Regarding any Enrichment on the Part of Germany

174. In addition, Liechtenstein bases its claims to compensation and reparation against Germany on the theory that Germany is still subject to reparation claims of a third party, namely Czechoslovakia[1] and, apparently, the Czech Republic as its successor State (again, the lack of precision in the Memorial is glaring – Liechtenstein simply glosses over possible effects of the succession issue, the State of Czechoslovakia having ceased to exist on 31 December 1992). Without introducing any evidence on the matter, Liechtenstein asserts: "Germany was subject to a strict obligation of reparations … . *This is a continuing obligation*"[2]. But the Court could not decide on any compensation due for unlawful seizure of Liechtenstein property by Czechoslovakia without first determining the legal relationships between Germany and a third sovereign State, namely the Czech Republic.

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[1] LM, p. 156, para. 6.38.

[2] LM, p. 156, para. 6.38, emphasis added.

175. Even if, for the sake of argument, one accepted Liechtenstein's contention that Germany had somehow changed its position towards the lawfulness of the Beneš Decrees in the 1990s, there is no way to avoid a determination of hypothetical claims of reparations between the Czech Republic and Germany. If no reparations are due, why should Germany be enriched by an alleged change of position in 1995? However, the Court cannot proceed to such a determination in the absence of the successor States of Czechoslovakia.

176. Under these circumstances, the obvious conclusion must be that a judgment of the Court on the substance of Liechtenstein's claim would presuppose a decision on claims to reparations of a third party which is not present in the instant case. Germany suggests to the Court that it decline to deal with an issue between the Respondent in the instant case and a third party which is not present before it. Both the analysis of alleged "unjust enrichment" of Germany and the alleged detriment of Liechtenstein by an alleged "change of position" of Germany depend on a prior legal pronouncement of the Court on the existence of reparation claims between Germany and the Czech Republic. Therefore, the Czech Republic is an indispensable third party in the present proceedings. Hence, the Court cannot exercise jurisdiction.

3. Conclusion: In the Absence of Czech Consent the Court Lacks Jurisdiction over the Case

177. A decision of the Court on an alleged German recognition of the seizure of Liechtenstein property in Czechoslovakia, the question of reparations allegedly owed by Germany to the Czech Republic, and the question of German enrichment through recognition of Czechoslovak seizures, requires the consent

of the Czech Republic to the exercise of jurisdiction by the Court. However, such consent has not been given. In the absence of the consent of the Czech Republic, the Court cannot exercise jurisdiction in the present case.

C. THE QUESTION OF CZECH CONSENT IS OF EXCLUSIVELY PRELIMINARY CHARACTER

178. According to Article 79, paragraph 7, of the Rules of Court, the Court may declare that an objection does not possess an exclusively preliminary character. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court used this prerogative to refer a preliminary objection as to the indispensability of a third party to the merits. However, in that case, the Court had come to the conclusion that in deciding on the indispensability claim, "the Court would of necessity have to deal with the merits of Cameroon's request"[1].

179. But in the present case, in order to decide on the indispensability of the participation of the Czech Republic, it is not at all necessary that the Court deal with the merits of Liechtenstein's request: The Court does not have to deal with the question of an alleged change of position on the part of Germany. It does not have to approach the issue of unjust enrichment as between Liechtenstein and Germany. It does not have to deal with the question whether Germany has in any way disregarded Liechtenstein's sovereignty and neutrality. It does not have

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[1] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 324, para. 116.

to deal with the legality of the Beneš Decrees, etc. Before any of these questions can be approached, the Court first has to deal with the necessary presence of the Czech Republic in these proceedings.

D. CONCLUSION

180. As a result of this inquiry, Germany asks the Court to declare Liechtenstein's Application inadmissible because the Court cannot rule on the case in the absence of the Czech Republic. In particular, the Czech Republic is an indispensable third party regarding the alleged infringements of the rights of Liechtenstein's citizens by Czechoslovakia. It is an indispensable third party regarding any claim of compensation or reparation by Liechtenstein or its citizens. And it is an indispensable third party regarding Liechtenstein's claims of unjust enrichment of Germany and of injury to Liechtenstein by the alleged change of position on the part of Germany.

Section III.

Liechtenstein Nationals have Failed to Exhaust Available Local Remedies

A. THE ACTION BROUGHT BY LIECHTENSTEIN AS EXERCISE OF DIPLOMATIC PROTECTION

181. It has already been pointed out that according to Article 40, paragraph 1, of the Statute, which has been elaborated upon in the case law of the Court, the Application defines the subject of the dispute. In the *Nuclear Tests* cases, the Court stressed that the Application "must be the point of reference for the consideration by the Court of the nature and existence of the dispute brought before it"[1]. Proceeding from this premise, there can be no doubt that the proceedings instituted by Liechtenstein against Germany must be classified as an attempt to exercise diplomatic protection for the benefit of a number of Liechtenstein nationals who were deprived of their properties through the large-scale confiscation measures carried out by Czechoslovakia during a period immediately after World War II.

182. The claims presented in paragraph 25 of the Application leave no doubt as regards the true nature of the legal relationship which in the view of Liechtenstein exists between it and Germany. Liechtenstein states quite unequivocally that it seeks reparation for the loss of property it has suffered. All

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[1] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 260, para. 24; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 463, para. 24.

the property in issue is property of Liechtenstein citizens. Not even according to the submissions of Liechtenstein were sovereign rights of the State of Liechtenstein, or property held directly by it, affected. Textually, Liechtenstein contends that "by its conduct with respect to the Liechtenstein property, in and since 1998, Germany failed to respect the rights of Liechtenstein with respect to that property"[1]. The conclusions to be drawn from this first claim are confirmed by a second claim according to which Germany is alleged to be in breach of the rules of international law "by its failure to make compensation for losses suffered by Liechtenstein and/or its nationals"[2]. In this phrase, the reference to losses sustained by Liechtenstein itself can only be understood as indirect damage inflicted upon Liechtenstein on account of the measures of confiscation applied to its citizens. Indeed, nowhere in the Application or in the Memorial does one find even the slightest hint that State property of Liechtenstein was also taken away by Czechoslovakia.

183. Germany observes for the sake of clarity that personal property of the Reigning Prince and property of the State of Liechtenstein must be distinguished. Two propositions should be borne in mind. In the first place, the Reigning Prince is not the owner of all public property of Liechtenstein which the State holds in its own territory or elsewhere. Second, the personal property of the Prince is private property *tout court*, without any reservation or modification, in any event for the purposes of international law. Consequently, if the State of Liechtenstein seeks

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[1] LA, para.25, claim (a).

[2] LA, para. 25, claim (b).

to assert claims with respect to property formerly owned by its ruling Prince, or in any event owned by him until 1945, it proceeds according to the rules on diplomatic protection. Such a claim cannot be classified as a claim for the reparation of direct damage.

B. THE ALLEGED VIOLATIONS OF LIECHTENSTEIN'S NEUTRALITY AND SOVEREIGNTY DO NOT CHANGE THE NATURE OF THE CASE

184. In its Memorial, Liechtenstein expands its requests and considerably modifies the causes of action invoked by it. The sole conclusion of the Application is now shifted to the second position. In the first place, Liechtenstein wishes the Court to declare that by its conduct "Germany has failed to respect the sovereignty and neutrality and the legal rights of Liechtenstein and its nationals with respect to the property"[1]. In other words, Liechtenstein now contends that this is not just a case of diplomatic protection, but a case the subject-matter of which is direct violations of Liechtenstein's sovereign rights. However, just by changing the wording of its submissions Liechtenstein cannot change the true nature of the case.

185. It is not the first time in the history of the Court that a State appearing as a party in an adversarial proceeding contends that a claim brought by it, although essentially based on the allegation that its citizens were unlawfully deprived of their assets, cannot simply be classified as an exercise of diplomatic protection.

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[1] LM, p. 187.

In the *Interhandel* case[1], Switzerland argued that there was no requirement to exhaust the remedies available in the United States since the injury in issue had been directly caused to it through the breach of an international treaty. The Court did not accept that argument. Considering that the injury suffered by Switzerland was of an ancillary nature, it rightly held that the proceedings essentially remained a case for the vindication of the rights of Interhandel, a corporation under Swiss law. In fact, each and every case of alleged unlawful taking of property of aliens could easily be blown up to the dimensions of a genuine inter-State dispute rooted in direct injury to the victim State concerned. One would only have to interpret unlawful measures of expropriation as implying lack of respect for the sovereign rights of the State of nationality of the persons concerned. Such classification of property disputes, however, would, in practical terms, do away with the requirement of prior exhaustion of local remedies. It could not be reconciled with the traditional procedural framework the pivot of which is for good reasons constituted by the requirement of prior exhaustion of local remedies.

186. Likewise, in the *ELSI* case[2] the Court emphasized that a claim seeking reparation for an alleged injury to a private person, a national of the applicant, still comes within the purview of diplomatic protection even if the applicant invokes at the same time the violation of international treaty obligations by the respondent. It said that the matter which "colours and pervades the United States

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[1] *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 6.

[2] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15.

claim as a whole" was the alleged damage to the corporation that had been driven into insolvency; consequently, there was no part of the claim which could be "severed so as to render the local remedies rule inapplicable to that part"[1]. Hence, the present case must be considered as a coherent whole. It cannot be split up into different parts some of which would be subject to the requirement of exhaustion of local remedies, while others would remain exempt from that requirement.

187. In his second report on diplomatic protection, submitted in 2001[2], the ILC's Special Rapporteur on the topic, John Dugard, has devoted careful consideration to the distinction between direct and indirect damage, which defines the borderline between instances where immediate recourse to international adjudication is open and such other instances where the victim must wait until all remedies promising reasonable prospects of success have proven to be of no avail in the circumstances. On the basis, in particular, of the *Interhandel* and the *ELSI* cases, which he rightly sees as founded on the test of "preponderance" and the "but for" test[3], he suggests the following rule (Article 11) not as progressive development of the law, but as codification of the law as it stands:

> "Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national and where the

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[1] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 43, para. 52.

[2] J. Dugard, 'Second Report on Diplomatic Protection', 28 February 2001, UN doc. A/CN.4/514.

[3] Dugard, 'Second Report', p. 11, para. 21.

> legal proceedings in question would not have been brought but for the injury to the national. [In deciding on this matter, regard shall be had to such factors as the remedy claimed, the nature of the claim and the subject of the dispute.]"[1]

188. The application of these two tests yields very clear results. As can be seen from the requests formulated in the Application, Liechtenstein is primarily interested in obtaining financial compensation for the losses its nationals suffered through Czechoslovakia's policy of confiscation. Only at a later stage, during the drafting of the Memorial, did it occur to the Liechtenstein Government and their counsel that it might be useful to complement the original requests by additional submissions based on the premise that Germany's "change of position" amounted also to a direct violation of Liechtenstein's rights. However, a close look at Liechtenstein's pleadings reveals that in concrete terms all that forms the subject-matter of the present case is the loss of property that occurred in 1945 at the hands of Czechoslovakia, a conglomerate of actions by Czechoslovak authorities over which German courts do not hold jurisdiction, as authoritatively confirmed once more by the Federal Constitutional Court in its decision of 28 January 1998.[2] Although the Memorial puts into first place the alleged violation of Liechtenstein's sovereignty and neutrality[3], it is quite clear that the case contains not a single element outside the property issue which might give it a tinge that would remove it from the area of diplomatic protection.

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[1] Dugard, 'Second Report'., p. 10.

[2] LM, Annex 32, vol. II, p. 353.

[3] LM, p. 187.

189. Given this factual configuration, there can be no doubt that the property issue constitutes the centrepiece of the dispute. It has absolute preponderance. Likewise, the "but for" test leads to the same result. Liechtenstein had no other reason to institute proceedings against Germany "but for" its desire to seize the last chance it saw to be compensated for the damage caused to its nationals by Czechoslovakia in 1945. It certainly would never have brought an action against Germany if it had not been for the pecuniary aspects of the lamentable economic consequences of Czechoslovakia's policies, embodied in the Beneš Decrees. It is clear, therefore, that the requirement of exhaustion of local remedies applies to the instant case. The alleged victims had to make a reasonable effort to exhaust such remedies before Liechtenstein could commence legal action before the Court.

190. Liechtenstein refrains from specifying what happened in all the other cases apart from the *Pieter van Laer Painting* case. That dispute is described almost affectionately in every little detail, with one important exception, however, which should again be emphasized: Liechtenstein abstains from informing the Court about the reasons for which the European Court of Human Rights dismissed the application filed by Prince Hans Adam II under the European Convention on Human Rights as being ill-founded.[1] It is clear, therefore, that in the painting dispute local remedies, which include also the application under the European Convention on Human Rights, have indeed been exhausted. But there

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[1] *Prince Hans-Adam II of Liechtenstein* v. *Germany*, Judgment of 12 July 2001, GPO, Annex 1.

exists an absolute lack of information concerning efforts relating to the real estate located in the Czech Republic and in Slovakia which until the end of World War II was allegedly owned by the persons accounted for in the "list of 38"[1].

C. THE APPLICABILITY OF THE LOCAL REMEDIES RULE – A NEGATIVE RESULT WITH RESPECT TO GERMANY

191. Notwithstanding the inference already drawn that the requirement of exhaustion of local remedies applies to the facts submitted to the Court by Liechtenstein, Germany has great difficulties in specifying what legal remedies the alleged victims should have taken. This lack of certainty does not so much flow from the fact that decisions of the Federal Constitutional Court cannot be challenged any more within the German legal system: Decisions of the highest German judicial body can only be brought to judicial review by lodging an application with the Strasbourg Court of Human Rights. Rather, it is the absolute lack of an identifiable act of interference which would embarrass a German lawyer in pointing to a specific remedy. Germany has provided itself with a system which enables everyone to defend his/her rights in the widest possible way. Article 19, paragraph 4, of the Basic Law, the German Constitution, provides that judicial review shall be granted to everyone claiming that his/her rights have been violated by an act of governmental authority. But any such alleged violation must be identified. For that purpose, it is necessary precisely to state which act

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[1] LM, Annex 8, vol. I, p. 32.

or omission has allegedly brought about the interference complained of. In the absence even of an allegation of interference, a remedy will not be granted.

192. In this regard, two factors must be noted. First of all, as already explained in Chapter III Section I of the present Preliminary Objections, Germany has no knowledge whatsoever regarding the Liechtenstein property adversely affected by Czechoslovakia's confiscation measures. The Federal Government must openly admit that it has never had official information about the extent of the damage suffered by the 38 Liechtenstein nationals, and, as the Court itself will be able to perceive, this information gap has not been cured by Liechtenstein's pleadings in that neither the Application nor the Memorial have bothered to provide the relevant data.

193. In fact, Germany is amazed to note that according to Liechtenstein's allegations it should have interfered with property the existence of which is unknown to it and which is located in a foreign country over which Germany does not enjoy jurisdiction. It is difficult to imagine that Germany, under these circumstances, should have made some kind of conscious decision with regard to this property consisting of "arable land and forests, numerous buildings and their contents, factories etc."[1]. The "change of position", which Liechtenstein believes to perceive in the case law of the German courts that have consistently respected the Settlement Convention since 1955, has nothing to do with all that real estate located in the Czech Republic and in Slovakia. Issues concerning the different

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[1] LM, p. 8, para. 2.

component elements of that immovable property have never come before German courts, and they will never come before them inasmuch as in accordance with general rules of private international law, as they are also reflected in Article 23 of the German Code of civil procedure, only the local judiciary is competent to rule on issues connected with the ownership of real estate. There was never any interference by Germany with the property Liechtenstein citizens owned in Czechoslovakia at the end of World War II. The adoption of a certain interpretation of the Settlement Convention regarding proceedings instituted before German civil courts can by no stretch of imagination be construed as such interference.

194. Germany therefore comes to the conclusion that, although in principle the case must be classified as exercise of diplomatic protection, the requirement of the exhaustion of local remedies does not apply, for the simple reason that there was no act of interference that could have been challenged before German courts.

D. THE APPLICABILITY OF THE LOCAL REMEDIES RULE – A POSITIVE RESULT WITH REGARD TO CZECHOSLOVAKIA AND THE CZECH REPUBLIC

1. Considerations Supporting the Requirement

195. However, Germany is of the view that the Liechtenstein victims of the Czechoslovak confiscation policy should have contested before the courts of the former Czechoslovakia the confiscation measures taken to their detriment. They should at least have attempted to avert the losses which Czechoslovakia inflicted upon them by depriving them of their possessions. In fact, the Czechoslovak

measures were the proximate cause of the damage which constitutes the heart of the present dispute. Liechtenstein itself confines itself to contending that Germany brought into being a second cause, a remote cause, for that damage.

196. The thesis defended by Germany may seem odd at first glance. There is a broad consensus in the case law of the Court[1] as well as in legal doctrine[2] to the effect that the requirement of exhaustion of local remedies is designed to provide the alleged wrong-doing State with an opportunity to make good any incorrect action it may have taken before the case will be dealt with at the international level by a body outside the domestic sphere. Here, the Respondent is Germany. Consequently, under normal circumstances only judicial remedies available in Germany would have to be taken into account. In any other case of diplomatic protection, in fact, Germany would just have submitted that the persons the claims of which the Applicant had espoused should have made use of the wide array of legal remedies provided by the German legal system.

197. This is, however, no normal case. Liechtenstein charges Germany with causing damage to its nationals by invoking a circumstance which is remote from the actual damage – the existence of which is of course not denied – and which is not connected by any link of causality with that damage. The interference which matters in fact is the strategy of confiscation pursued by Czechoslovakia in 1945-46. Even according to Liechtenstein's pleadings, Germany is at most

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[1] See *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 27.

[2] See, for instance, C.F. Amerasinghe, *Local Remedies in International Law* (Grotius, Oxford, 1990), pp. 68-69.

second in the chain of events, or rather the third actor, inasmuch as the stipulation in Article 3, paragraph 3, of Chapter Six of the Settlement Convention goes back to a specific demand of the Three Western Powers which made the abolition of the occupation regime dependent on Germany's consent to a clause which would make all the measures taken with a view to enforcing reparations or restitution immune from scrutiny by German courts. In this special and absolutely extraordinary configuration the last actor in a chain of three cannot be denied the benefit of invoking the failure of the Claimant's nationals to contest the primary cause of the calamity that befell them, namely the Czechoslovak measures of confiscation.

2. The Case of the Reigning Prince

198. It emerges from Liechtenstein's Memorial[1] that the then Reigning Prince, Franz Josef II, filed appeals against the confiscation of his personal assets and the assets of his family. Apparently, all of these appeals were rejected. Liechtenstein has furnished the Court with a copy and an English translation of the judgment rendered by the Administrative Court in Bratislava on 21 November 1951[2] wherein the Court declared that the appeal lodged by the Prince "had to be dismissed for being unreasonable"[3]. But nothing is known about any measures of defence taken by the other victims. Since Liechtenstein remains silent in this

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[1] LM, p. 28, para. 1.22.

[2] LM, Annex 9, vol. I, p. 34.

[3] It would appear that the word "unreasonable" is a wrong translation of the original Czech word. Probably, the right word would have been "ill-founded".

respect, it is to be assumed that no steps were taken with a view to submitting the dispute to the courts of Czechoslovakia. Thus, during the decisive first stage, where the damage could possibly have been averted, the victims failed to exhaust the judicial remedies at their disposal.

199. Liechtenstein has provided no proof evidencing that the Administrative Court in Bratislava was the last instance in the dispute concerning the Czechoslovak confiscation measures. Assuming, however, that this can be proven in Liechtenstein's response to these Preliminary Objections, the fact remains that the other alleged victims have abstained from defending their rights before the courts of Czechoslovakia. The argument that judicial remedies offered no reasonable prospects of success would not be a pertinent defence, as will be shown in the following.

3. The Case of the Other Victims

200. It is true that Czechoslovakia's Decree No. 12 of 21 June 1945, "concerning the confiscation and accelerated allocation of agricultural property owned by Germans, Hungarians and also by people who have committed treason and acted as enemies of the Czech and Slovak people"[1] provides in a rigid manner that the confiscation policy decided by the government of the country should comprise the property of "all persons belonging to the German and Hungarian people, regardless of their nationality" (Article 1, paragraph 1, lit. (a)). Deliberately, as

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[1] LM, Annex 6, vol. I, p. 9.

the text evinces, the Government chose to ignore the criterion of nationality. But this does not mean that for a Liechtenstein citizen any challenge of a confiscation decree was without any reasonable prospects of success from the very outset. When applying the Decree, the courts had in any event to find out whether a person belonged to "the German people". It is well known that before World War II important minorities of ethnic Germans lived in almost all countries of Eastern Europe, outside Czechoslovakia also in Hungary, Yugoslavia and Poland, for instance, countries which were close neighbours of Czechoslovakia. One may with good reason assume that the clause determining the scope of application *ratione personae* of Decree No. 12 was primarily meant to include in the confiscation regime all the ethnic Germans having the nationality of one of these countries.

201. It is a different matter altogether to interpret the relevant clause as including also nationals of third countries who in a wide cultural sense, because of their mother tongue, may be classified as Germans. Not only nationals of Liechtenstein, but also nationals of Switzerland or Luxembourg could be covered by such a wide notion of the German people. Nothing is known, however, about confiscatory measures taken by Czechoslovakia against Swiss or Luxembourg nationals. Consequently, the victims could with a high degree of persuasiveness argue that they did not come within the purview of application of Decree No. 12.

202. The fact that the appeals lodged by the then reigning Prince, Franz Josef II, were dismissed, could not be taken as a final and unchallengeable determination that all Liechtenstein nationals were members of "the German people". The main argument relied upon by the Administrative Court of Bratislava[1] was a very simple and succinct one. It argued that the capacity of Franz Josef II as a member of the German people was "of public knowledge". No further details were given. The Court did not hold that indeed Liechtenstein nationality was negligible and that therefore Liechtenstein citizens could be lumped together with other ethnic Germans as elements of "the German people". Rather, the decision focused on the specific personal characteristics of the Appellant, concluding that in his case the requirements of the law were fulfilled.

203. It may be true that other Liechtenstein victims of the Czechoslovak measures felt discouraged by the course the proceedings instituted by their Prince before the competent courts took. But on the basis of the available evidence it is by no means sure that an appeal lodged by another Liechtenstein national would also have been dismissed. There is no need, in this connection, to embark on a discussion of the different tests which have been suggested as constituting the appropriate method of defining the exemption from the burden of exhausting local remedies where in the circumstances doubts may have arisen as to the effectiveness of contesting a detrimental governmental act. In his third report on

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[1] LM, Annex 9, vol. I, p. 34, at 37.

diplomatic protection[1], ILC Special Rapporteur John Dugard has carefully examined the three tests competing for general recognition. None of the three tests – obvious futility, lack of reasonable prospect of success, lack of reasonable possibility of an effective remedy – would have dispensed the other victims from resorting to litigation before the Czechoslovak courts to defend their rights.

204. In the first place, the judgment of the Administrative Court in Bratislava limits its findings to the actual case of the Reigning Prince it had to adjudicate. Second, during the time when the confiscatory measures were carried out in Czechoslovakia, it can be assumed that the judiciary was aware of Czechoslovakia's obligations under international law. Therefore the ambiguous formula of Decree No. 12 ("the German people") could without any difficulty have been construed as not including the population of a third State that had maintained its neutrality during the entire duration of the armed conflict from 1939 to 1945.

205. Germany feels also compelled to invoke the failure of the affected Liechtenstein nationals to try again, after Czechoslovakia had liberated itself from Communist rule, to recover the property of which they had been unlawfully deprived. By acceding to the European Convention on Human Rights, Czechoslovakia manifested its will to return to the Europe predicated on the rule of law. It signed the Convention on 21 February 1991, depositing its instrument of

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[1] J. Dugard, 'Third Report on Diplomatic Protection', 7 March 2002, UN doc. A/CN.4/523.

ratification on 18 March 1992. The two successor States have held on to that act of faith by continuing their membership in the Council of Europe and the European Convention on Human Rights. At that time, there was an appropriate moment to attempt again at least to obtain financial compensation for the losses suffered. Once again, Germany must express its amazement that Liechtenstein, instead of immediately turning to Czechoslovakia and later to the Czech Republic and Slovakia to assert its compensation claims, seized none of these opportunities afforded by the demise of the Communist regime, but instituted the present proceedings against Germany under the pretext of a fundamental "change of position" in the German case law concerning the interpretation of the Settlement Convention.

206. In hindsight, it might be argued that neither in 1945 nor after the fall of the Communist regime in Prague, were there remedies that had the slightest prospect of success, so that there could be no requirement to undertake judicial steps for the recovery of the confiscated property. Indeed, the position taken by the Czech Government in proceedings under the First Optional Protocol to the International Covenant on Civil and Political Rights may be taken as an indication that the Czech Republic is intent on blocking any revision of the confiscation policy carried out in 1945.[1] But the prospects of an available remedy must be evaluated *ex ante*, focusing on the time when the remedy in issue could have been filed. It may now be clear that the Czech Republic is not

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[1] See *Karel des Fours Walderode* v. *Czech Republic*, 2 Nov. 2001, UN doc. CCPR/C/73/D/747/1997, GPO Annex 5.

willing to review and correct unlawful actions which earlier governments took in the past. But in 1945 as well as after the restoration of most of civil liberties during the period from 1989 to 1993, it could by no means be taken for granted that the Czech Republic would rigidly stick to the policies conceived of and implemented by its former President, Mr. Beneš.

E. CONCLUSION

207. Summing up this section of its Submissions on the admissibility of the proceedings instituted by the Czech Republic, Germany concludes that the action must be declared inadmissible also on the ground that, apart from the *Pieter van Laer Painting* case and possibly the case concerning the real estate inherited by the present reigning Prince, the victims failed to exhaust the available local remedies.

208. Should the Court not share the view that the non-exhaustion of local remedies in Czechoslovakia and the Czech Republic qualifies as a preliminary objection that can be raised by Germany, Germany would develop the argument more fully in its written pleadings on the merits – in case the dispute should ever reach that stage. In any event, that failure would have to be taken into account as contributory negligence. If the victims abstained from fighting for their rights in the appropriate fora, they cannot expect that the losses confirmed by their passivity will be assumed by a third party which neither had any duty of diligence with regard to the property concerned, nor had the power to stop the unlawful actions committed by the Czechoslovak Government.

PART IV

CONCLUSIONS AND SUBMISSIONS

209. On the basis of the preceding Submissions, Germany summarizes its Preliminary Objections as follows:

1) The case is outside the jurisdiction of the Court since

   (a) there exists no dispute as between Liechtenstein and Germany in the sense required by the Statute of the Court and Article 27 of the *European Convention for the Peaceful Settlement of Disputes* of 29 April 1957;

   (b) all the relevant facts occurred before the entry into force of the European Convention as between the Parties;

   (c) the occurrences on which Liechtenstein bases its claims fall within the domestic jurisdiction of Germany.

2) Liechtenstein's Application is furthermore inadmissible since

   (a) Liechtenstein's claims have not been sufficiently substantiated;

   (b) adjudication of Liechtenstein's claims would require the Court to pass judgment on rights and obligations of the successor States of former Czechoslovakia, in particular the Czech Republic, in their absence and without their consent;

(c) the alleged Liechtenstein victims of the measures of confiscation carried out by Czechoslovakia have failed to exhaust the available local remedies.

210. For the reasons advanced, Germany requests the Court to adjudge and declare that:

- it lacks jurisdiction over the claims brought against Germany by the Principality of Liechtenstein, referred to it by the Application of Liechtenstein of 30 May 2001,

and/or that

- the claims brought against Germany by the Principality of Liechtenstein are inadmissible to the extent specified in the present Preliminary Objections.

27 June 2002

Dr. Gerhard Westdickenberg

Agent of the Federal Republic of Germany

LIST OF ANNEXES

(contained in Volume II)

Annex 1: *Prince Hans-Adam II of Liechtenstein v. Germany,* European Court of Human Rights, Application no. 42527/98, Judgment of 12 July 2001.

Annex 2: *AKU Case*, Judgment of the German Federal Court of Justice (*Bundesgerichtshof*) of 13 December 1956, (1957) *Neue Juristische Wochenschrift (NJW)*, p. 217; Translation: 23 *ILR*, p. 21.

Annex 3: Judgment of the German Federal Court of Justice (*Bundesgerichtshof*) of 11 April 1960, 32 *Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ)*, p. 172.

Annex 4: Judgment of the German Federal Constitutional Court of 23 April 1991, 84 *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE), p. 90; Translation: 94 *ILR*, p. 44.

Annex 5: *Karel des Fours Walderode* v. *Czech Republic,* Human Rights Committee, Communication No. 747/1997, 2 November 2001, (UN. Doc. CCPR/C/73/D/747/1997).

Annex 1

Prince Hans-Adam II of Liechtenstein v. Germany
Application no. 42527/98
European Court of Human Rights, Judgment of 12 July 2001

CONSEIL
DE L'EUROPE

COUNCIL
OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF PRINCE HANS-ADAM II OF LIECHTENSTEIN v. GERMANY

(Application no. 42527/98)

JUDGMENT

STRASBOURG

12 July 2001

This judgment may be subject to editorial revision.

In the case of Prince Hans-Adam II of Liechtenstein v. Germany,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mrs E. PALM, *President*,
Mr C.L. ROZAKIS,
Mr G. RESS,
Mr J.-P. COSTA,
Mr A. PASTOR RIDRUEJO,
Mr I. CABRAL BARRETO,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mrs M. TSATSA-NIKOLOVSKA,
Mr K. TRAJA,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER, *judges*,
and also of Mr M. de SALVIA, *Jurisconsult, for the Registrar*,

Having deliberated in private on 31 January and 27 June 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 42527/98) against the Federal Republic of Germany lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by His Serene Highness Prince Hans-Adam II of Liechtenstein ("the applicant"), on 28 July 1998.

2. The applicant was represented before the Court by Mr A. Goepfert, a lawyer practising in Düsseldorf. The German Government ("the Government") were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*.

3. The applicant alleged, in particular, that he had been deprived of an effective access to court in respect of his claim for restitution of property, namely a painting confiscated by former Czechoslovakia under the Presidential Decree No. 12. He also complained that the German court decisions to declare his action inadmissible, and the consequential return of the painting to the Czech Republic, violated his right to property. He invoked Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, taken alone and together with Article 14 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court.

On 6 June 2000 it was declared admissible by a Chamber of that Section, composed of the following judges: Mr A. Pastor Ridruejo, *President,* Mr G. Ress, Mr I. Cabral Barreto, Mr V. Butkevych, Mrs N. Vajić, Mr J. Hedigan, Mr M. Pellonpää, and also of Mr V. Berger, Section Registrar.

The Government of Liechtenstein, having been informed of their right to intervene (Article 36 § 1 of the Convention and Rule 61 § 1 of the Rules of Court), indicated that they had no intention of so doing.

On 14 September 2000 the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. Due to the withdrawal of Mr L. Wildhaber, the President of the Court, Mrs E. Palm replaced him as President of the Grand Chamber in this case and Mr K. Traja participated as judge.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 31 January 2001 (Rule 59 § 2).

There appeared before the Court:

– *for the Government*

Mr	K. STÖHR, *Ministerialrat,*	*Deputy Agent,*
Mrs	S. WASUM-RAINER, *Ministerialrat,*	*Adviser;*

– *for the applicant*

Mr	A. GOEPFERT, of the Düsseldorf Bar,	*Counsel,*
Mr	P. RÄDLER, of the Düsseldorf Bar,	
Mr	D. BLUMENWITZ, law professor at the Würzburg University,	
Mrs	G. KLEIN,	*Advisers.*

The Court heard addresses by Mr Stöhr, Mr Goepfert, Mr Rädler and Mr Blumenwitz, and their answers to questions put by some of the judges.

8. The applicant and the Government each filed observations on the question of just satisfaction under Article 41 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is the monarch of Liechtenstein, who was born in 1945 and lives in Vaduz (Liechtenstein).

A. The background of the case

10. The applicant's late father, the former monarch of Liechtenstein, had been the owner of the painting "*Szene an einem römischen Kalkofen*" (*alias Der große Kalkofen*) of Pieter van Laer, which had formed part of his family's art collection since at least 1767. Until the end of World War II the painting had been in one of the family's castles on the territory of the now Czech Republic.

11. In 1946, former Czechoslovakia confiscated the property of the applicant's father which was situated in its territory, including the painting in question, under the Decree No. 12 on the "confiscation and accelerated allocation of agricultural property of the German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people" (*dekretu prezidenta republiky č. 12/1945 Sb. o konfiskaci a urychleném rozdělení majetku Němců, Mad'arů, zrádců a nepřátel*), issued by the President of former Czechoslovakia on 21 June 1945 ("Benes Decrees" - "*Benešovy dekrety*").

12. On 21 November 1951 the Bratislava Administrative Court (*správní soud*) dismissed the appeal lodged by the applicant's father.

In its reasoning on the merits of the case, the Administrative Court stated that the defendant office had come to the conclusion that the appellant was a person of German nationality within the meaning of the provision in section 1a of the Decree, on the basis of the finding that this was and had been generally known. It noted that the defence of the complaint directed against this finding was restricted to the representation that this finding was not supported in the files and that due to this shortcoming it had not been necessary to deal with this finding in greater detail. The Administrative Court considered that this approach was mistaken as, under the relevant provision of the administrative regulations, no evidence was required for facts which were generally known and that, therefore, no evidence had to be furnished in the administrative files; however, counter evidence against the official finding that a certain fact was generally known would have been admitted.

The Administrative Court concluded that, as the appellant had failed to raise the objection that the issue was not a fact of general knowledge and to contend that he was in a position to bring counter evidence, the finding of the defendant office had remained uncontested.

B. The proceedings in the German courts

13. In 1991 the Municipality of Cologne obtained the painting as a temporary loan by the Brno Historical Monuments Office in the Czech Republic.

14. On 11 November 1991 the Cologne Regional Court (*Landgericht*) granted the applicant's request for an interim injunction ordering the Municipality of Cologne to render the painting to a bailiff at the end of the exhibition. The painting was sequestrated on 17 December 1991.

15. In the beginning of 1992, the applicant instituted proceedings before the Cologne Regional Court against the Municipality of Cologne, claiming the defendant's consent that the bailiff should render the painting to him. He argued that, as his late father's heir, he was the owner of the painting concerned. He submitted that the painting had not been subject to expropriation measures in former Czechoslovakia and that in any event such measures were invalid or irrelevant for violation of the *ordre public* of the Federal Republic of Germany.

16. In these proceedings, the Brno Historical Monuments Office intervened in support of the defendant. It submitted that the applicant's father had lost his ownership of the painting as a result of the confiscation in 1946 and that the lawfulness of this confiscation had been confirmed by the Bratislava Administrative Court in its decision of 21 November 1951.

17. On 10 October 1995 the Cologne Regional Court, following a hearing, declared the applicant's action inadmissible. In the court's view, Chapter 6, Article 3 of the Convention on the Settlement of Matters Arising out of the War and the Occupation (*Vertrag zur Regelung aus Krieg und Besatzung entstandener Fragen* - the "Settlement Convention") of 23 October 1954 between the United States of America, the United Kingdom of Great Britain and Northern Ireland, the French Republic and the Federal Republic of Germany excluded German jurisdiction regarding the applicant's case.

In its reasoning, the Regional Court noted that under the terms of Chapter 6, Article 3 § 3, in conjunction with § 1, claims or actions against persons having acquired or transferred title to property on the basis of measures carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of specific agreements, were not admissible. These particular provisions had been confirmed upon German unification.

According to the Regional Court, Chapter 6, Article 3 § 3, of the Settlement Convention applied, *mutatis mutandis*, to the applicant's claims against the defendant which had obtained the painting as a loan and had not acquired property, as any review of the aforementioned measures should be excluded.

The Regional Court found that the confiscation of the applicant's father's property under the Decree No. 12 on the "confiscation and accelerated allocation of agricultural property of the German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people", issued by the President of former Czechoslovakia on 21 June 1945, constituted a measure within the meaning of Chapter 6, Article 3.

The Regional Court rejected in particular the applicant's argument that this provision did not apply, as it only concerned measures carried out with regard to German external assets or other property and his father had never been a German citizen. In this respect, the court, referring to case-law of the Federal Court of Justice (*Bundesgerichtshof*), stated that the view of the confiscating State was decisive. The aim and purpose of this provision, namely to sanction confiscation measures implemented abroad without any further examination, could only be achieved by excluding such measures from judicial review in Germany.

Moreover, the Regional Court found that the confiscation measure in question pursued one of the purposes mentioned in Chapter 6, Article 3 § 3. Having regard to German case-law regarding other "Benes Decrees", especially Decree No. 108 on the "confiscation of enemy property and the national reform fund", it considered that Decree No. 12, while also pursuing economic aims, was intended to expropriate the property of German and Hungarian nationals, i.e. "enemy property".

The Regional Court further noted that the painting of the applicant's father had been expropriated under Decree No. 12. The competent Czechoslovakian authorities had interpreted its provisions as applying to the applicant's father, regarding him as a "person of German nationality". The applicant's father had unsuccessfully appealed against this decision which had been confirmed by the Bratislava Administrative Court in 1951. The German courts were not in a position to review the lawfulness of the confiscation at issue.

Finally, the Regional Court considered that the painting at issue, as part of the inventory of the agricultural property, had been included in the confiscation measure.

The Regional Court dismissed the applicant's request to suspend the proceedings in order to await the outcome of proceedings to be instituted under the German Equalisation of Burdens Act (*Lastenausgleichsgesetz*) concerning the compensation for damages and losses due to, *inter alia*, expulsion and destruction during World War II and the post-war period in the then Soviet occupied zone of Germany and of Berlin. The Regional Court considered that the question underlying the litigation before it would not be clarified in such proceedings. Irrespective of the question of whether the plaintiff was of German origin, he had no equalisation claims under the said legislation which only applied to persons who had resided in the Federal Republic of Germany or West Berlin on 31 December 1952. In any event, there was no right to compensation for the loss of works of art (*Kunstgegenstände*).

18. On 9 July 1996 the Cologne Court of Appeal (*Oberlandesgericht*) dismissed the applicant's appeal. The Court of Appeal confirmed that the applicant's action was inadmissible as German jurisdiction in respect of his claim was excluded under Chapter 6, Article 3 § 1, in conjunction with § 3, of the Settlement Convention.

The Court of Appeal considered that the notion of German jurisdiction included the competence, derived from State sovereignty and generally vested by the State in the courts, to administer justice. German jurisdiction was delimited by international agreements, customary international law and the generally recognised rules of international law. Chapter 6, Article 3 § 3, in conjunction with § 1, of the Settlements Convention excluded German jurisdiction in respect of claims and actions against persons, who, as a consequence of reparation measures, had directly or indirectly acquired title to German property confiscated abroad.

The Court of Appeal confirmed that the provisions in question continued to be in force under the Treaty on the Final Settlement with respect to Germany of 12 September 1990. Article 7 of this Treaty, which provided for the termination of the operation of quadripartite rights and responsibilities with respect to Berlin and Germany as a whole, was amended by the Agreement of 27/28 September 1990 according to which the Settlement Convention was suspended and later terminated with the exception of the provisions stated in paragraph 3 of this Agreement, *inter alia* Chapter 6, Article 3 §§ 1 and 3. This Agreement was valid under public international law and under German constitutional law.

The Court of Appeal further considered that Chapter 6, Article 3 § 3, of the Settlement Convention applied in the applicant's case. In the court's view, this provision was the procedural consequence of the idea that the legal relations resulting from the liquidation of German property abroad by foreign powers for the purpose of reparation were "final and unchallengeable" ("*Endgültigkeit und Unanfechtbarkeit*") for the Federal Republic of Germany and the private persons concerned.

According to the Court of Appeal, the applicant's constitutional rights, in particular his right to property, his right of access to a court and his right to a decision by the legally competent court (*gesetzlicher Richter*) had not been infringed. Basic rights protected individuals against acts of domestic public authorities and not against the exercise of public authority by a foreign State abroad. The domestic legislator was therefore not prevented from limiting domestic legal protection against violations of basic rights by a foreign State if necessary to reach more important goals.

When applying Chapter 6, Article 3 § 3, of the Settlement Convention, the domestic law of the expropriating State concerning the concrete confiscation measure had to be taken into account, as this provision was aimed at excluding litigation in Germany regarding confiscation measures based on legislation concerning enemy property.

As regards the applicant's objections against the lawfulness, in particular under public international law, of the confiscation and expropriation of his father's property, the Court of Appeal found that German courts had no jurisdiction under Chapter 6, Article 3 § 3, of the Settlement Convention. Likewise, this provision did not allow having recourse to general rules of public international law or to the German *ordre public* when examining the admissibility of the action. The applicant's argument that the provisions of the Settlement Convention and their application to him as a national and Head of a neutral State violated the law of peace was accordingly rejected.

According to the Court of Appeal, the painting at issue constituted external assets within the meaning of Chapter 6, Article 3 § 1, of the Settlement Convention, referred to in paragraph 3 of Article 3. The Court of Appeal noted that the applicant's father had indisputably never had German nationality. However, following the case-law of the Federal Court of Justice, it considered that the notion of "German external assets" had to be interpreted in the light of the law of the expropriating State. The confiscation in dispute had been found in compliance with the legislation of the expropriating State: the competent Czechoslovakian administrative authorities as well as the Bratislava Administrative Court had found that the Presidential Decree No. 12 of 21 June 1945 applied to the applicant's father's confiscated property. Section 1(1)(a) of this Decree provided for the confiscation of agricultural properties of "all persons of German or Hungarian nationality" irrespective of their citizenship. The notion of "German nationality", or of "German origin" ("*deutsche Volkszugehörigkeit*"), likewise used at that time, comprised as relevant elements a person's citizenship and nationality, the latter depending on the mother tongue. At the relevant time, the Czechoslovakian authorities indisputably regarded the applicant's father as of German origin in that broader sense.

The Court of Appeal also found that the painting at issue, as part of the confiscated agricultural property, had been subject to the expropriation measure. There were no doubts as to the effectiveness of the expropriation, as it was sufficient under the relevant case-law that such expropriations had been implemented and that the previous owners had been deprived of their factual power of disposition. Furthermore, the painting had been confiscated for the purpose of reparation within the meaning of Chapter 6, Article 3 §§ 1 and 3, of the Settlement Agreement. The personal limitation of the confiscation measures to persons belonging to enemy States in itself justified such a conclusion. The assets of the persons concerned were confiscated as enemy assets.

Finally, the Court of Appeal considered that both the defendant and the intervener belonged to the group of persons protected by Chapter 6, Article 3 § 3, of the Settlement Agreement. German jurisdiction was excluded whenever the plaintiff intended to challenge measures within the meaning of Chapter 6, Article 3 § 1.

19. On 25 September 1997 the Federal Court of Justice (*Bundesgerichtshof*) refused to entertain the applicant's appeal on points of law, as the case was of no fundamental importance and, in any event, had no prospect of success.

20. On 28 January 1998 the Third Section of the Second Division (*3. Kammer des Zweiten Senats*) of the Federal Constitutional Court (*Bundesverfassungsgericht*) refused to entertain the applicant's constitutional complaint (*Verfassungsbeschwerde*) as it offered no prospect of success.

The Federal Constitutional Court considered in particular that, for the purposes of the civil court decisions, questions as to the existence or non-existence of certain rules of customary international law on the confiscation of neutral assets or on the determination of citizenship were irrelevant as they concerned the issue of the lawfulness of the expropriation by former

Czechoslovakia. The German civil courts had not decided on this issue and, under public international law, they had not been obliged to do so. Moreover, to the extent that the civil courts had regarded the expropriation as a measure within the meaning of Chapter 6, Article 3 § 1, of the Settlement Convention, they had expressly refrained from qualifying the applicant's father's nationality. Their interpretation of the terms "measures against German external assets" as comprising any measures which, in the intention of the expropriating State, were directed against German assets, could not be objected to under constitutional law. The bar on litigation did not constitute an agreement to the detriment of Liechtenstein, as only the Federal Republic of Germany and its courts were under this treaty obligation.

The Federal Constitutional Court further recalled that the exclusion of jurisdiction did not amount to a violation of the right to property as these clauses and the Settlement Convention as a whole served to settle matters dating back to a time before the entry into force of the German Basic Law (*Grundgesetz*) on 23 May 1949.

Finally, there was no indication of arbitrariness or of a violation of other constitutional rights. The Federal Constitutional Court confirmed that Chapter 6, Article 3 §§ 1 and 3, of the Settlement Convention had not been set aside by the Treaty on the Final Settlement with respect to Germany: while Germany obtained full sovereignty, its obligations under treaties with the Three Powers were not affected. This had also been the legal opinion of the Federal Republic and the Three Powers which otherwise would not have settled the suspension and termination of parts of the Settlement Convention in a separate agreement.

The decision was served on 2 February 1998.

21. On 9 June 1998 the Cologne Regional Court suspended its interim injunction of 11 November 1991. The bailiff thereupon handed the painting over to the Cologne Municipality which had it returned to the Czech Republic.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. The Benes Decree No. 12

22. The Benes Decree No. 12 on the "confiscation and accelerated allocation of agricultural property of the German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people" provided for the expropriation, with immediate effect and without compensation, of agricultural property, for the purposes of land reform. It concerned agricultural property, including *inter alia* buildings and movable goods on such property, in the ownership of all persons of German and Hungarian nationality irrespective of their citizenship status.

According to section 2 of the said Decree, those persons were to be considered as German or Hungarian nationals who, in any census since 1929 had declared to be of German or Hungarian nationality, or who had become members of national groups, formations or political parties which had been made up of persons of German or Hungarian nationality.

B. The Convention on the Settlement of Matters Arising out of the War and the Occupation

23. After the German capitulation of 8 May 1945, the Four Powers had assumed the supreme authority in Germany, as stated in the Allied Declaration of 5 June 1945 (Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic, UNTS 68, p. 190 et seq.). The supreme military commanders of the four Allied Forces administered their respective zones and dealt jointly, through the Inter-Allied Control Council, with all matters relating to the country as a whole, i.e. military matters, transport, finance, economic affairs, reparations, justice, prisoners of war, communications, law and order, as well as political affairs.

24. The Convention on the Settlement of Matters Arising out of the War and the Occupation (the "Settlement Convention", see paragraph 17 above) is one of the "Bonn Conventions" ("*Bonner Verträge*") signed by France, the United States of America, the United Kingdom and the Federal Republic of Germany at Bonn on 26 May 1952, and designed to end the Occupation Regime

The other Bonn Conventions were

- the Convention on Relations between the Three Powers and the Federal Republic of Germany (the "Relations Convention");
- the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany;
- the Finance Convention.

25. The Bonn Conventions as such did not enter into force, but were amended in accordance with the five Schedules to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, one of the "Paris Agreements", which were signed in Paris on 23 October 1954.

26. Article 1 of Schedule I which amends the above Relations Convention states that the three Powers will terminate the Occupation Regime in Western Germany, revoke the Occupation Statute, and abolish the offices of the *Land* Commissioners. The Federal Republic of Germany

is accorded "the full authority of a sovereign State over its internal and external affairs". According to Article 2, the Three Powers retain their rights "relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement".

27. The above-mentioned Paris Agreements comprise:

(1) Documents signed by France and the Federal Republic of Germany, relating to disputes between the two States (the resolution of cultural, economic and other difficulties) and to the Saar;

(2) Documents signed at the so-called Four-Power Conference by France, the United States of America, the United Kingdom and the Federal Republic of Germany, relating to German sovereignty and including in particular:
  - the above-mentioned Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany and the five Schedules thereto (amending the Relations Convention, the Settlement Convention and the other Bonn Conventions), as well as letters dealing with specific points in the Bonn Conventions;
  - the Convention on the Presence of Foreign Forces in the Federal Republic of Germany.

  In this context, mention should be made of the Tripartite Declaration on Berlin.

(3) Documents signed by Belgium, the Netherlands, Luxembourg, France, the United Kingdom, the Federal Republic of Germany and Italy, including the
  - Protocol Modifying and Completing the Brussels Treaty;
  - Protocol on the Forces of Western European Union;
  - Protocol on the Control of Armaments:
  - Protocol on the Agency of Western European Union for the Control of Armaments;
  - Resolution on the Production and Standardisation of Armaments;

(4) Documents signed by the 14 North Atlantic Treaty countries:
  - Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany;
  - Resolution by the North Atlantic Council to implement Section IV of the Final Act of the London Conference;
  - Resolution on the results of the Four and Nine-Power Conferences;
  - Resolution of Association taking note of the obligations accepted by the Federal Republic on the signature of the London Agreements and of the declaration relating to such obligations.

28. Under the general provisions of the Settlement Convention (Federal Gazette - ***Bundesgesetzblatt II***, 31 March 1955, p. 405 *et seq.*), as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime (see paragraph 25 above), the Federal and the Land authorities were given powers to repeal or amend legislation enacted by the Occupation Authorities.

However, in many other respects, the status quo was confirmed. In particular, rights and obligations created or established by or under legislative, administrative or judicial action of the Occupation Authorities remained valid for all purposes under German law. The same applied to rights and obligations arising under treaties or international agreements which had been concluded on behalf of the three Western Zones of Occupation by the Occupation Authorities or by the Governments of the Three Powers. Furthermore, there was a bar on prosecution of persons by action of German courts or authorities on the ground of having sympathised with or aided or furnished with information or services the Three Powers or their Allies. German courts and authorities had as a rule no jurisdiction in any criminal or non-criminal proceedings relating to an act or omission which had occurred before the date of entry into force of this Convention, if immediately prior to such date German courts and authorities were without jurisdiction with respect to such act or ommission whether *ratione materiae* or *ratione personae*. The finality (*Rechtskraft*), validity and enforceability of judgments and decisions in non-criminal or criminal matters rendered in Germany by tribunals or judicial authorities of the Three Powers or any of them was confirmed.

29. Chapter 6 of the Settlement Convention concerns reparation issues and its Article 3, as far as relevant, provides as follows:

> "1. The Federal Republic of Germany shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany.
>
> ...
>
> 3. No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraph 1 ... of this Article, or against international organisations, foreign governments or persons who have acted upon instructions of such organisations or governments."

C. The Paris Agreement on Reparations

30. At the eighteen-nation Paris Reparations Conference in November and December 1945, the participating States, including Czechoslovakia, agreed on more detailed policies based upon the Potsdam undertakings (provisions agreed upon at Potsdam on 1 August 1945 between the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics) in order to obtain an equitable distribution among themselves of the total assets available as reparation from Germany, in order to establish an Inter-Allied Reparation Agency, and to settle an equitable procedure for the restitution of monetary gold.

The Paris Agreement (Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency, and on the Restitution of Monetary Gold of 14 January 1946, UNTS 555 p. 69) established, *inter alia*, the shares which each country was to receive from German reparations. The Inter-Allied Reparation Agency, established in accordance with Part II of the Agreement, charged the reparation account of each Signatory Government for the German assets within that Government's jurisdiction and maintained detailed accounts of assets available for, and of assets distributed as, German reparation.

D. The Act concerning Losses due to Reparations

31. The Act concerning Losses due to Reparations of 12 February 1969 (*Gesetz zur Abgeltung von Reparations-, Restitutions-, Zerstörungs- und Rückerstattungsschäden - Reparationsschädengesetz*, Federal Gazette 1969 I p. 105) is one of the statutes passed to deal with the consequences of the Second World War and the collapse of the National Socialist regime.

32. Section 2(1) of the Act provides a general definition of losses due to reparations and reads, as far as relevant, as follows:

> "A loss due to reparations in the meaning of this Act is any loss, which occurred in the context of the events and consequences of the Second World War, including also the occupation regime, and resulted from the fact that economic goods were taken away
>
> 1. in currently occupied East German territories or in territories outside the German *Reich* on the basis of measures carried out by foreign States with regard to German assets, in particular on the basis of legislation on enemy property,

33. Sections 11 to 16 lay down the conditions of compensation for losses. The Act was limited to losses suffered by natural persons (section 13(1)). In case of losses which had occurred in the then occupied East German territories or in territories outside the German *Reich*, only German nationals or persons of German origin (*deutscher Volkszugehöriger*), who were, at the time of the occurrence of loss, stateless or had only the nationality of a State where they had been subjected to expropriation or expulsion measures on account of their German origin could claim compensation (section 13(2)). Section 15 lists works of art and collections among the losses excluded from compensation. The time-limit for filing compensation claims under the Act expired on 31 December 1974 (section 53).

E. Legal materials concerning the German Unification

34. During 1990, in parallel with internal German developments, the Four Powers (France, the Soviet Union, the United Kingdom and the United States) negotiated to end the reserved rights of the Four Powers for Berlin and Germany as a whole.

The Treaty on the Final Settlement with respect to Germany (so-called Two-Plus-Four Treaty) was eventually signed in Moscow on 12 September 1990, and published in the Federal Gazette on 13 October 1990 (p. 1308 *et seq.*). The Treaty confirms in particular the definite nature of the borders of the united Germany (Article 1). According to its Article 7, the rights and responsibilities of the Four Powers relating to Berlin and Germany as a whole terminated with the result that the corresponding, related quadripartite agreements, decisions and practices were terminated; and the united Germany was given full sovereignty over its internal and external affairs. The Treaty entered into force on 15 March 1991.

35. As regards the above-mentioned Relations Convention and the Settlement Convention, as amended, an agreement was reached between the Governments of the Federal Republic of Germany, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America, following an exchange of notes on 27 and 28 September 1990, which entered into force on the last-mentioned date (Federal Gazette II, 8 November 1990, p. 1386 *et seq.*).

This agreement provides, *inter alia*:

> "1. The Convention on Relations between the Three Powers and the Federal Republic of Germany of 26 May 1952 ... ("the Relations Convention") shall be suspended upon the suspension of the operation of quadripartite rights and responsibilities with respect to Berlin and to Germany as a whole, and shall terminate upon the entry into force of the Treaty on the Final Settlement with respect to Germany, signed at Moscow on 12 September 1990.

> 2. Subject to paragraph 3 below, the Convention on the Settlement of Matters Arising out of the War and the Occupation of 26 May 1952 ... ("the Settlement Convention") shall be suspended and shall terminate at the same time as the Relations Convention; ...
>
> 3. The following provisions of the Settlement Convention shall, however, remain in force:
>
> ...
>
> Chapter Six:
>
> Article 3, paragraphs 1 and 3
>
> ..."

36. The political union of the Federal Republic of Germany and the German Democratic Republic occurred on 3 October 1990, with the accession (in accordance with Article 23 of the Basic Law) of the five *Länder* which had been re-established in the German Democratic Republic.

F. German Private International Law

37. The second chapter of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*), as in force at the relevant time (as amended by the *Gesetz zur Neuregelung des Internationalen Privatrechts* of 25 July 1986, Federal Gazette 1986 I p. 1142), contained statutory rules of German private international law relating to the rights of natural persons and the rules on legal transactions, the family law and the law on succession. This legislation did not comprise statutory provisions on property matters and, before the entry into force of the 1999 Act on Private International Law (*Gesetz zum internationalen Privatrecht für ausservertragliche Schuldverhältnisse und für Sachen*, 21 May 1999, Federal Gazette 1999 I, p. 1026, amending chapter 2 of the Introductory Act to the Civil Code), the German courts applied customary law, i.e. as a rule the *lex rei sitae*. According to section 6 of the Introductory Act to the Civil Code, the legal provisions of a foreign State shall not be applied if their application would lead to a result incompatible with essential principles of German law (*ordre public*).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

38. The applicant complained of a breach of Article 6 § 1, which is worded as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] ... tribunal ..."

39. His complaints concerned his right of access to a court and the alleged unfairness of the proceedings before the Federal Constitutional Court.

A. Applicability of Article 6 § 1 of the Convention

40. The Court notes that the German court proceedings at issue concerned the applicant's claim for restitution of a painting which had belonged to his late father, the former monarch of Liechtenstein and which had been confiscated by former Czechoslovakia in 1946. Challenging in particular the validity of the said expropriation, the applicant had argued that, as heir, he was the owner of the painting concerned.

The Government did not dispute that these proceedings related to the "determination of his civil rights". In the light of this, and bearing in mind that the parties' arguments before it were centred on the issue of compliance with Article 6 § 1, the Court will proceed on the basis that it was applicable to the present case.

B. The right of access to a court

1. Arguments of those appearing before the Court

a. The applicant

41. The applicant submitted that the German courts' decisions declaring his action inadmissible under Chapter 6, Article 3 §§ 1 and 3, of the Settlement Convention amounted to a denial of access to court.

According to the applicant, the interpretation of the Settlement Convention by the German courts in the instant case had been contrary to international law and therefore violates the Convention. In his view, the confiscation of Liechtenstein property by the authorities of former Czechoslovakia could not possibly be regarded as confiscation of "German external assets" within the meaning of Chapter 6, Article 3 § 1 of the Settlement Convention. In the case of the applicant's father in his capacity as the Head of State of the sovereign State of Liechtenstein, the finding of the Bratislava Administrative Court in 1951, according to which his "ethnic German origin" was "generally known", was incomprehensible.

Referring to the sovereignty of Liechtenstein and its neutrality during World War II, the applicant further considers that the German courts arbitrarily assumed that the assets owned by the applicant's father had been seized "for the purpose of reparation". Czechoslovakia had never charged its reparation account under the Paris Reparation Agreement of 1946 with the confiscated Liechtenstein assets as "German external assets". There is no indication that the Settlement Convention was intended to cover confiscation measures directed against neutral property and should be interpreted in a way contrary to neutrality law.

Finally, customary international law had prohibited confiscation of works of art.

b. The Government

42. The Government state that the provision in the Settlement Convention had been necessary for the purpose of re-establishing the initially partial and later complete sovereignty of Germany and to ensure the recognition of German property. Sovereignty was granted to the Federal Republic *ex nunc* and the exclusion of German jurisdiction was to ensure that orders and measures of the Allies dating back to the time of the German occupation were not retroactively questioned.

They pointed out that Germany did not have any influence on the deprivation of property nor on the organisation of property relations in former Czechoslovakia and its successor states. The exclusion of German jurisdiction, which had been established in the Settlement Convention and had been maintained in the Agreement of 27 and 28 September 1990 following the Two plus Four Treaty, neither prejudiced nor affected *de facto* the power to dispose of property. This was true at least for the great majority of cases where property had remained within the territory of former Czechoslovakia. The provision had only consequences of a procedural nature, and no qualification of the individual confiscation measures was involved. Furthermore, only German jurisdiction was excluded, not the possibility of lodging claims in foreign courts. In particular, the applicant was not prevented from instituting proceedings before Czech or Slovak courts, claiming restitution of the property confiscated in 1946. Finally, a statutory regulation and international obligation could only cover the usual course of events and not exceptional situations.

The Government further submitted that the German courts had given extensive and comprehensible reasons for their decisions. The question of whether or not their interpretation of Chapter 6, Article 3 of the Settlement Convention was correct in an individual case was irrelevant. At least, having regard to the reasoning adopted by the Bratislava Administrative Court, the assumption of the German courts that the property had been seized as German property for reparation purposes in a more general sense was not arbitrary, but defendable. The relevant provisions of the Benes Decree No. 12 differentiated between citizenship and nationality or "ethnicity", a criterion also found in the confiscation acts of other East European States or in German legislation.

2. *The Court's assessment*

a. General principles

43. Firstly, the Court recalls that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, § 36, and *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 50, ECHR 1999-I).

44. The right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany*, cited above, § 59, and *T.P. and K.M. v. the United Kingdom* [GC], No. 28945/95, § 98, ECHR 2001; *Z. and Others v. the United Kingdom* [GC], No. 29392/95, § 93, ECHR 2001).

If the restriction is compatible with these principles, no violation of Article 6 will arise.

45. In this context, it should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in

view of the prominent place held in a democratic society by the right to a fair trial (see *Waite and Kennedy v. Germany* cited above, § 67).

46. Secondly, as regards the responsibility of the High Contracting Parties under the Convention, the Court points out that Article 1 requires them to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention".

Article 1 makes no distinction as to the type of rule or measure concerned, and does not exclude any part of the Contracting States' "jurisdiction" from scrutiny under the Convention (see the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, pp. 17-18, § 29).

47. Thus the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States (see, *mutatis mutandis*, *Matthews v. the United Kingdom* [GC], No. 24833/94, §§ 29, 32-34, ECHR 2000-I).

48. The Court recalls in this respect that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the object and purpose of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. In determining whether granting an international organisation immunity from national jurisdiction is permissible under the Convention, a material factor is whether reasonable alternative means were available to protect effectively the rights under the Convention (see *Waite and Kennedy v. Germany*, cited above, §§ 67-68).

49. Thirdly, the Court reiterates the fundamental principles established by its case-law on the interpretation and application of domestic law.

While the Court's duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.

50. Moreover, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects

of such an interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany*, cited above, § 54; and, as recent authority, *Streletz, Kessler and Krenz v. Germany* [GC], Nos. 34044/96, 35532/97, 44801/98, § 49, ECHR 2000).

b. Application of the above principles to the present case

51. In the present case, the applicant based his property claim, as his late father's heir, on the submission that the painting had not been subject to expropriation measures in former Czechoslovakia and that in any event such measures were invalid or irrelevant for violation of the *ordre public* of the Federal Republic of Germany. The German courts did not address these arguments relating to the German rules of private international law and to the merits of his property claim, but concentrated on the preliminary question of whether Chapter 6, Article 3 of the Settlement Convention excluded German jurisdiction and decided that his action was barred by operation of law. The Federal Court of Justice and the Federal Constitutional Court declined to accept his case for adjudication.

52. The Court considers that the applicant was thereby deprived of his right to a determination of his property claim, in application of the rules of private international law. It will have to examine whether the German courts were allowed under Article 6 § 1 of the Convention to limit the applicant's right of access to a court in order to give effect to the rules of an international agreement excluding German jurisdiction concerning "measures which have been, or will be, carried out, *inter alia*, with regard to German external assets or other property, seized for the purpose of reparation or restitution".

53. The Court must first determine whether the limitation as such pursued a legitimate aim.

54. The Court observes at the outset that the Federal Republic of Germany, when ratifying the Convention on 5 December 1952, was still an occupied country under the supreme authority of the Four Powers, France, the United States of America, the United Kingdom and the Soviet Union. This generally known situation prevailed when the Convention entered into force on 3 September 1953.

The Settlement Convention was one of a series of agreements, signed by France, the United States of America, the United Kingdom and the Federal Republic of Germany in 1952 and amended in accordance with the five Schedules to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed on 23 October 1954 (see paragraphs 24-28 above).

According to Schedule I amending the Relations Convention, the Occupying Powers terminated the Occupation Regime in Western Germany, revoked the Occupation Statute, and abolished the offices of the *Land*

Commissioners. The Federal Republic was thereby accorded "the full authority of a sovereign State over its internal and external affairs". Nevertheless, the Occupying Powers retained their rights "relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement" and Foreign Forces remained present in the Federal Republic of Germany. Specific provision was made for the validity of rights or obligations established by or under the Occupation authorities and the validity, finality and enforceability of judgments and decisions rendered by them.

55. The Court finds that, when negotiating the terms of the Settlement Convention and the related agreements, the Federal Republic of Germany was not negotiating a transfer of competences or the restriction of sovereignty in matters of jurisdiction which it already possessed. On the contrary, it was negotiating for the transfer to itself of sovereign authority and for the termination of the Occupation Regime (see, *mutatis mutandis*, Eur. Commission HR, Appl. No. 235/56, Dec. 10.6.1958, Yearbook 2, pp. 257 et seq., at p. 300; see also No. 6231/73, Dec. 28.5.1975, DR 2, p.72).

56. The Court accepts that after the Second World War the Federal Republic of Germany was not in a position to argue against the intention of the Three Powers to exclude a review of confiscation measures against German external assets for reparation purposes by German courts or to impose other limitations on German jurisdiction under the Settlement Convention.

In this context, the Court would add that not only Contracting Parties to the Convention were involved in these negotiations. Vis-à-vis the United States of America, the Federal Republic of Germany could not invoke any obligations under the Convention.

57. The Court notes that this situation prevailed until 1990 when, in parallel with internal developments towards a unified Germany, the Four Powers started negotiations resulting in the Treaty on the Final Settlement with respect to Germany, which was signed on 12 September 1990 and entered into force on 15 March 1991. This so-called Two-Plus-Four Treaty provided, in its Article 7, for the termination of the rights and responsibilities of the Four Powers relating to Berlin and Germany as a whole and for the full sovereignty of the united Germany. An additional agreement between the Three Powers and the Federal Republic of Germany of 28 September 1990 dealt with the suspension of the Relations Convention and Settlement Convention and provided that certain provisions of the Settlement Convention including, *inter alia*, Chapter 6, Article 3 thereof remained in force.

58. The Court finds that when half a century after the end of the Second World War, a final settlement with respect to Germany and the unification of the two German States were within reach, the position of the Federal

Republic of Germany had not changed. In the negotiations with the Three Powers, the Federal Republic of Germany had to accept that this specific limitation on its jurisdiction was not abolished.

59. In the Court's view, the exclusion of German jurisdiction under Chapter 6, Article 3 of the Settlement Convention is a consequence of the particular status of Germany under public international law after the Second World War. It was only as a result of the 1954 Paris Agreements with regard to the Federal Republic of Germany and the Treaty on the Final Settlement with respect to Germany of 1990 that the Federal Republic secured the end of the Occupation Regime and obtained the authority of a sovereign State over its internal and external affairs for a united Germany. In these unique circumstances, the limitation on access to a German court, as a consequence of the Settlement Convention, had a legitimate objective.

60. Having reached this conclusion, the Court will next look at the interpretation and application of the said provision in the applicant's case.

61. The German courts concluded that the conditions under Chapter 6, Article 3 of the Settlement Convention for declaring the applicant's action inadmissible for lack of German jurisdiction were fulfilled.

The Cologne Regional Court considered that the said provision excluded any review, by German courts, of measures carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of specific agreements. In dealing with the applicant's argument that this provision did not apply as it concerned measures carried out with regard to German external assets and his father had never been a German citizen, the Regional Court, accepting that the applicant's father had never had German nationality, regarded the view of the confiscating State as decisive. The authorities of former Czechoslovakia had expropriated the painting at issue, as part of the inventory of agricultural property, under the provisions of the Benes Decree No. 12, regarding him as a "person of German nationality". The Cologne Court of Appeal confirmed that Chapter 6, Article 3 of the Settlement Convention, as it aimed at excluding litigation regarding confiscation measures based on legislation concerning enemy property, had to be applied in the light of the law of the expropriating State.

The Federal Constitutional Court found that the civil courts' interpretation was not arbitrary and could not be objected to under German constitutional law.

62. The Court notes that Chapter 6, Article 3 of the Settlement Convention excluded German jurisdiction in respect of litigation concerning "measures ... carried out with regard to German external assets or other property, seized for the purpose of reparation". In the process of terminating the Occupation Regime, the Three Powers thereby upheld a restriction on sovereign rights of the Federal Republic of Germany in restitution matters which were transferred to it under the Settlement Convention. Bearing in mind the object and purpose of the Settlement Convention and its political background, it was not unreasonable for the German courts to assume that the logic of the system excluded any German review of confiscation measures carried out by the Three Powers or other Allied countries for the purpose of reparation.

63. In the instant case, the German courts had elements at their disposal which indicated that the authorities of former Czechoslovakia, when confiscating the painting at issue as part of the agricultural property of the applicant's father, had carried out a measure with regard to "German external assets or other property, seized for the purpose of reparation". In particular, the property had been confiscated in application of the Decree No. 12 on the "confiscation and accelerated allocation of agricultural property of the German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people". Moreover, in the proceedings before the Bratislava Administrative Court, the administrative authorities of former Czechoslovakia had made it clear that they regarded the applicant's father as a person of German nationality within the meaning of this Decree.

64. In this connection, the Court observes that the German courts were not required to assess whether the standard of the Bratislava Administrative Court proceedings resulting in the decision of November 1951 was adequate, in particular if seen against the procedural safeguards of the Convention (see, *mutatis mutandis*, the Drozd and Janousek judgment of 26 June 1992, Series A no. 240, p. 34, § 110).

65. In the light of these findings and having regard to the limited power of review exercisable by the Court (see paragraphs 49-50 above), it cannot be said that the German courts' interpretation of Chapter 6, Article 3 of the Settlement Convention was inconsistent with previous German case-law or that its application was manifestly erroneous or was such as to reach arbitrary conclusions.

66. Furthermore, in examining whether the limitation on the applicant's access to the German courts is compatible with the principles established in the Court's case-law (see paragraphs 44-48 above), the Court attaches particular significance to the nature of the applicant's property claims in respect of the painting at issue. As part of the applicant's father's agricultural property in former Czechoslovakia, it had been expropriated by the authorities of former Czechoslovakia in 1946 and had remained within the latter State's territory and later within the territory of the Czech

Republic. As the Government pointed out, the exclusion of German jurisdiction did not affect the great majority of such cases where property had remained within the territory of the expropriating State. The genuine forum for the settlement of disputes in respect of these expropriation measures was, in the past, the courts of former Czechoslovakia and, subsequently, the courts of the Czech or of the Slovak Republic. Indeed, in 1951 the applicant's father had availed himself of the opportunity of challenging the expropriation in question before the Bratislava Administrative Court (see paragraph 12 above).

67. The Court finds that, for the applicant, the possibility of bringing litigation in the Federal Republic of Germany to challenge the validity and lawfulness of the expropriation measures, which had been carried out by former Czechoslovakia at a time prior to the existence of the Federal Republic of Germany under its 1949 Constitution, was a remote and unlikely prospect. It was only when, in 1991, the Municipality of Cologne received the painting on loan from the Czech Republic that the applicant brought proceedings before the German courts and that the exclusion of German jurisdiction under Chapter 6, Article 3 of the Settlement Convention became operative. It prevented the applicant from obtaining a decision by the German courts, under the principles of German private international law, on his property claim and especially his argument that the confiscation measures of 1946 constituted a violation of the German *ordre public* (see paragraphs 15 and 34 above).

68. Moreover, the factors referred to above - the particular status of the Federal Republic of Germany under public international law after the Second World War and the fortuitous connection between the factual basis of the applicant's claim and German jurisdiction - distinguish the present case from the case of Waite and Kennedy v. Germany (see paragraph 48 above) concerning the transfer of competences to an international organisation where the Court regarded as a material factor whether there were reasonable alternative means to protect effectively the rights under the Convention.

69. In view of the above, the Court considers that the applicant's interest in bringing litigation in the Federal Republic of Germany was not sufficient to outweigh the vital public interests in regaining sovereignty and unifying Germany. Accordingly, the German court decisions declaring the applicant's ownership action inadmissible cannot be regarded as disproportionate to the legitimate aim pursued and they did not, therefore, impair the very essence of the applicant's "right of access to a court" within the meaning of the Court's case-law (see paragraphs 43-44 above).

70. It follows that there has been no breach of the applicant's right to a court, as guaranteed by Article 6 § 1.

C. The alleged unfairness of the proceedings before the Federal Constitutional Court

71. The applicant further submits that he did not have a fair hearing, as guaranteed under Article 6 § 1, in the proceedings before the Federal Constitutional Court.

72. The applicant submits that before the German courts, it was of essential importance to know whether Article 3 of the Settlement Convention had continued to have legal force, taking into account the Two plus Four Treaty and the Agreement of 27 and 28 September 1990. Deviating from the opinion of the Cologne Court of Appeal, the Federal Constitutional Court, for the first time in its decision, started on the assumption that the occupation treaties of the three Western Allies constituted an original legal regime independent of the law of the Four Powers and invoked a legal position of the Western Allies which had not been discussed.

73. The Government consider that the Cologne Court of Appeal had already dealt in detail with the history and the interpretation of the Two plus Four Treaty and of the Agreement of 27 and 28 September 1990. For them, it is decisive that the Court of Appeal had already argued that the Four plus Two Treaty had not already entailed the abrogation of the Settlement Convention as the law of the Three Powers. The Federal Constitutional Court had only confirmed this legal opinion - which therefore could not have been surprising for the applicant - and deepened the legal arguments thereon. Moreover, the Constitutional Court had not made use of comments withheld from the applicant. Rather, in order to ascertain the presumed legal opinion of the acting States, it had interpreted the treaties concerned in order to find therein a confirmation of its own legal view.

74. The Court finds that the applicant had the benefit of adversarial proceedings before the Federal Constitutional Court and that he was able to submit the arguments he considered relevant to his case (see, *mutatis mutandis*, the *Apeh Üldözötteinek Szövetsége, Iványi Róth and Szerdahelyi v. Hungary* judgment of 5 October 2000, No. 32367/96, § 39, ECHR 2000-X).

75. The Court shares the opinion of the Government that the Federal Constitutional Court had drawn inferences from the course of the international negotiations and the contents of international agreements, i.e. circumstances which had been known to the applicant and which had been the subject of argument in court in order to confirm the lower court's finding that Chapter 6, Article 3 §§ 1 and 3, of the Settlement Convention had not been set aside by the Treaty on the Final Settlement with respect to Germany.

76. In conclusion, the Court finds no indication of unfairness in the manner in which the proceedings at issue were conducted.

D. Conclusion

77. There has therefore been no violation of Article 6 § 1 in this case.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

78. The applicant complained that the German court decisions declaring his claims for ownership of the painting "*Szene an einem römischen Kalkofen*" by Pieter van Laer inadmissible and its return to the Czech Republic violated his right of property. He relied on Article 1 of Protocol No. 1, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

79. In the applicant's submission, the restitution of the painting in question to the Czech Republic amounted to an unlawful interference with his "existing possessions". The confiscation of the said painting by former Czechoslovakia under the Benes Decree No. 12 had been unlawful and void. His father had been neither "German" nor an "enemy of the Czech and Slovak people", as stipulated in that Decree. In his view, the confiscation had been contrary to public international law and had, therefore, to remain ineffective. In this respect, he referred to the Court's reasoning in the case of Loizidou v. Turkey (judgment (*merits*) of 18 December 1996, *Reports* 1996-VI). He considers that the Government's arguments giving effect to such an unlawful confiscation contradict the previous German practice not to recognise confiscation measures under the Benes Decrees. He also refers to decisions of the Czech Constitutional Court according to which confiscations on the basis of the Benes Decrees were invalid because the former Czechoslovakian authorities had assumed without good reason the "German ethnic origin" of the owner at the time.

80. The Government submitted that the confiscation measure and in particular the factual deprivation of the property in question had been carried out by former Czechoslovakia in 1946. With regard to these and other comparable confiscation measures, former Czechoslovakia and its successor states had never agreed to discuss the possibility of restitution.

Thus, in 1991 when the painting concerned came to Germany, the applicant could no longer have had any legitimate expectation to realise any property right. Furthermore, unlawfulness of a confiscation under international law does not entail lack of effect and there were no sufficient reasons to question the validity of the confiscation of the painting.

81. The Court notes that the applicant's complaint submitted under Article 1 of Protocol No. 1 does not concern the original confiscation of the painting which had been carried out by authorities of former Czechoslovakia in 1946. In the present proceedings, the applicant complains that, as in the German court proceedings instituted in 1992 he could not obtain a decision on the merits of his claim for ownership of the painting, it was eventually returned to the Czech Republic. The Court's competence to deal with this aspect of the application is therefore not excluded *ratione temporis* (see *Malhous v. the Czech Republic* (dec.), no. 33071/96, 13 December 2000, ECHR 2000-XII).

82. The applicant can allege a violation of Article 1 of Protocol No. 1 only insofar as the impugned decisions related to his "possessions" within the meaning of this provision.

83. The Court recalls that, according to the established case-law of the Convention organs, "possessions" can be "existing possessions" or assets, including claims, in respect of which the applicant can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see the recapitulation of the relevant principles in the above-mentioned Malhous decision, with further references, in particular to the Commission's case-law).

84. In the present case, the applicant brought proceedings before the German courts claiming ownership of the painting which had once belonged to his father. He challenged the validity of the expropriation carried out by authorities of former Czechoslovakia, his main argument being that the measure had allegedly been effected contrary to the terms of the Benes Decree No. 12 and to the rules of public international law.

85. As regards this preliminary issue, the Court observes that the expropriation had been carried out by authorities of former Czechoslovakia in 1946, as confirmed by the Bratislava Administrative Court in 1951, that is before 3 September 1953, the entry into force of the Convention, and before 18 May 1954, the entry into force of Protocol No. 1. Accordingly, the Court is not competent *ratione temporis* to examine the circumstances of the expropriation or the continuing effects produced by it up to the present

date (see *Malhous v. the Czech Republic* (dec.), cited above, and the Commission's case-law, for example, Mayer and Others v. Germany, applications no. 18890/91, 19048/91, 19342/92 and 19549/92, Commission decision of 4 March 1996, Decisions and Reports 85, pp. 5-20).

The Court would add that in these circumstances there is no question of a continuing violation of the Convention which could be imputable to the Federal Republic of Germany and which could have effects as to the temporal limitations of the competence of the Court (see, *a contrario*, the Loizidou v. Turkey judgment (*merits*), quoted above, p. 2230, § 41).

Subsequent to this measure, the applicant's father and the applicant himself had not been able to exercise any owner's rights in respect of the painting which was kept by the Brno Historical Monuments Office in the Czech Republic.

In these circumstances, the applicant as his father's heir cannot, for the purposes of Article 1 of Protocol No. 1, be deemed to have retained a title to property nor a claim to restitution against the Federal Republic of Germany amounting to a "legitimate expectation" in the sense of the Court's case-law.

86. This being so, the German court decisions and the subsequent return of the painting to the Czech Republic cannot be considered as an interference with the applicant's "possessions" within the meaning of Article 1 of Protocol No. 1 (see paragraph 78 above).

87. The Court thus concludes that there has been no violation of Article 1 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

88. The applicant complained that he had been discriminated against on the basis of his status as a Liechtenstein national, contrary to Article 14 which provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

89. The applicant submitted that while the German authorities regarded his father's assets in former Czechoslovakia as "German external assets" for the purposes of the Settlement Convention, the German equalisation legislation did not extend to losses of citizens of neutral States. He considered that no legitimate distinction could be made between German and foreign nationals in respect of compensation for losses due to reparation. Moreover, the Government could not rely on the exemption of

compensation for works of art after having recognised the confiscation of the painting concerned, which was in his view in breach of public international law.

90. The Government maintained that, as Article 1 of Protocol No. 1 was not applicable to the instant case, there was no room to find a violation of Article 14. In any event, it had not been necessary to include foreign nationals who had been victims of measures directed against German external assets in the legislation on compensation for losses due to reparation etc., as the margin of appreciation permitted the German State to provide particular welfare to its citizens. Other citizens could have resort to the legal and diplomatic protection by their native country. In any event, the Act on Losses due to Reparation did not provide for compensation in respect of losses of works of art and collections. Moreover, the time-limit for filing claims had expired on 31 December 1974.

91. As the Court has consistently held, Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions - and to this extent it is autonomous -, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see *Jewish liturgical association Cha'are Shalom Ve Tsedek v. France* [GC], No. 27417/95, § 86, ECHR 2000-VII).

92. The Court has found above that the facts of which the applicant complained under Article 1 of Protocol No. 1, namely the German court decisions and the return of the painting to the Czech Republic, did not amount to an interference with any of his rights under that provision. He cannot therefore claim that in these respects he had been discriminated against in the enjoyment of his property rights (see the Marckx judgment of 13 June 1979, Series A no. 31, p. 23, § 50).

93. The Court notes that the applicant alleged discrimination under the Act on Losses due to Reparations which only recognised compensation claims for German nationals or, under specific conditions, for persons of German origin, and not for foreign nationals.

However, the Convention does not guarantee any right to compensation for damages the initial cause of which does not constitute a violation of the Convention (see the Mayer and Others decision cited above, p. 18).

94. Article 14 does not therefore apply to the present case. Consequently, the Court finds no violation under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 6 § 1 of the Convention;
2. *Holds* that there has been no violation of Article 1 of Protocol No. 1;
3. *Holds* that there has been no violation of Article 14 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 July 2001.

Elisabeth PALM
President

Michele de SALVIA
Jurisconsult, for the Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following concurring opinions are annexed to this judgment:

- concurring opinion of Mr G. Ress, joined by Mr Zupančič;
- concurring opinion of Mr J.-P. Costa.

E.P.
M.d.S.

CONCURRING OPINION OF JUDGE RESS JOINED BY JUDGE ZUPANČIČ

If the applicant had an arguable claim under Article 6 § 1 of the Convention then the decision of the German courts not to accept that claim for adjudication, on the ground that his action was barred by operation of Article 3 of Chapter 6 of the Settlement Convention, amounted to a denial of justice (*déni de justice*). That rule of the Settlement Convention infringed the very essence of the right of access to courts, so that the question whether this kind of limitation can be regarded as a reasonable relationship of proportionality between the means employed and the aims sought to be achieved does not, in my view, even arise. Under the rule of the Settlement Convention the guarantee of access to court becomes really theoretical and illusory. Under the Settlement Convention this right has no practical and effective significance. This is so because the three Western Powers wanted with all probability to exclude any measures taken under the enemy legislation against German property, be it abroad or be it on German territory, from any scrutiny by the German courts. It does not seem arbitrary to conclude that those measures, whatever their justification may have been, should not have been called into question, at least not by the German courts, and that this was – and still is – the very significance of Article 3 of Chapter 6 of the Settlement Convention. Since the procedure before the German Courts was one of *rei vindicatio*, the Court is not concerned with the question of access to court for a claim to compensation for loss of property.

Nevertheless, I am in full agreement with the opinion that there was no violation of Article 6 § 1, but my reasoning would be somewhat different. Besides the limitations on the right of access to the courts described in paragraph 44 above, the Court should have stated that limitations may also follow from the specific legal status of a Contracting Party implicitly accepted by all other Parties at the time of ratification of the Convention. As the Court has observed in paragraph 54, the Federal Republic of Germany, when ratifying the Convention on 5 December 1952, was still an occupied country and under the supreme authority of the Four Powers, France, the United States of America, the United Kingdom and the Soviet Union. It was far from being a sovereign state and the exclusion of German jurisdiction under the Settlement Convention was, as the Court has shown in paragraph 59, a consequence of the particular status of Germany under public international law after the Second World War. A State under such an occupational regime, which was considered to be *sui generis*, was far from being able to fulfil all the requirements, in particular of Article 6, of the Convention. That must have been obvious not only to the Federal Republic of Germany, when the Convention came into force on 3 September 1953, but also to the other Contracting Parties at that time. The particular status of Germany was so obvious that no declaration to that effect was made in relation with the deposition of the instrument of ratification. Furthermore, any "reservation" to that effect would not have met the requirements under the former Article 64 (now Article 57). A reservation had to be related to specific provisions of the internal law. The particular status of Germany related to its situation under public international law in which it did not have the full authority of a sovereign state over its internal and external affairs. If Contracting States admit a State with such restrictions as to its statehood to the Convention and if the depository of the Convention, the Secretary General of the Council of Europe, has no objections to its admittance, it can be presumed that they do not have any objections to later treaties by which this restricted legal status in the field of jurisdiction over certain matters is merely confirmed. The Federal Republic of Germany had in fact no choice. To regain the full authority of a sovereign state it had to accept in 1954 as well as in 1990 these restrictions on the jurisdiction of the German courts. This is true even if in 1990 the Federal Republic fully participated in the prolongation of the Settlement Convention. That limitation on the jurisdiction of its courts cannot be judged according to the principle of proportionality since it was absolute and a kind of *force majeure* for the Federal Republic of Germany.

The Court relies mainly on two further elements in its examination of proportionality. Firstly, that the expropriation in question could have been challenged in the expropriating state, the former Czechoslovakia, and secondly that challenging the validity and lawfulness of the expropriation measure in the Federal Republic was a remote and unlikely prospect. I think that alternative means in the sense of the *Waite & Kennedy* judgment of 18 February 1999, [GC] n° 26083/94, ECHR 1999-I, p. 395 et seq., p. 411 (§ 68) cannot be alternative means in a third State, but must be access to the courts of the defendant State (see my dissenting opinion in the case of *Waite & Kennedy* to the majority opinion in the Report of the European Commission of Human Rights, *ibidem*, pp. 426 et seq., 427). The second argument, namely that the possibility of bringing litigation in the Federal Republic was remote, is an argument which relates to the nature of the claim itself and would need further examination. It would probably be in the interests of international art exhibitions for States to conclude agreements by which they exclude jurisdiction for such claims during the time of the exhibition. This kind of agreed limitation of jurisdiction, which is related to the remoteness of an eventual claim, could be discussed in the light of a general public interest. Until now, however, such a specific limitation on jurisdiction has not been accepted by the Court and it would not be easy to see this case only in the light of the public interest in art exhibitions.

Regardless of those considerations, the only convincing justification for the exclusion of the jurisdiction of the German courts is the particular international status of the Federal Republic of Germany. In contrast to the opinion of the Court in paragraph 69, this exclusion of German jurisdiction impaired the very essence of the applicant's right of access to a court and could not be measured according to the principle of proportionality. It is a structural limitation on the right of access to a court under Article 6 para. 1.

CONCURRING OPINION OF JUDGE COSTA

(Translation)

I agree with my colleagues that there has not been a violation of Article 6 § 1 of the Convention, but my reasons are different from those set out in the judgment and are fairly similar to those of Judge Ress. To my mind, it is difficult to maintain, as in paragraph 69 of the judgment, that the dismissal of the applicant's action by the German courts was not disproportionate to the legitimate aim pursued and did not therefore impair the very essence of the applicant's right of access to a court. That reasoning mixes up two approaches which the case-law of the Commission and of the Court had almost always carefully distinguished as two distinct alternatives: (explicit or implicit) limitations on the right to a court are compatible with Article 6 only if they do not restrict or reduce the access left to the litigant in such a way or to such an extent that the very essence of the right is impaired; furthermore, such limitations must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, pp. 24-24, § 57, or the Levages Prestations Services v. France judgment of 23 October 1996, *Reports* 1996-V, p. 1543, § 40). I find the reasoning of the present judgment both unorthodox and illogical. The question of proportionality arises only as a subsidiary issue, in the event that the very essence of the right to a court has not been affected. To deduce that there has not been an infringement of that right because there was a satisfactory relationship of proportionality is not at all convincing to my mind.

Furthermore, it is difficult in the instant case to assert that the Prince merely suffered limitations to his right of access to a court. Admittedly, his father had had the opportunity of challenging in an ex-Czechoslovakian court the application to his case of the Benes Decree, under which his property had been confiscated. However, that action (which was, moreover, dismissed by that court) had not exhausted his rights under Article 6 in the German courts, not least because the next action was brought against a different defendant and did not concern exactly the same object or cause of action. The adage *res judicata pro veritate habetur* was therefore inapplicable. Again, it is true that the German courts did not refuse to entertain his application to the extent that an interim injunction was granted sequestrating the painting immediately and was not discharged for seven and a half years. However, the German trial and appeal courts all ruled the applicant's claim inadmissible under the "Settlement Convention". It cannot therefore be said that access to the courts enabled the plaintiff to secure a determination of his rights; the courts in question based their decision on their lack of jurisdiction under an international treaty, and did not examine the merits of the dispute between the applicant, who claimed to be the owner of the painting, and the Municipality of Cologne, which had received it on loan from the Brno Historical Monuments Office. Hans-Adam II's access to a court was in fact so limited that "the very essence" of that right was indeed impaired.

If the approach taken by the judgment in concluding that there has not been a violation is unacceptable, what would have been the "correct" reasoning (if my immodesty can be forgiven)? The concept of an arguable claim might give cause for reflection. Having regard to the existence of the "Settlement Convention", the applicant did not have a recognised complaint, at least on arguable grounds, under domestic law in Germany. It is not rare to find reasoning of that kind in the case-law of the Convention institutions (see, for example, the Masson and Van Zon v. the Netherlands judgment of 28 September 1995, Series A no. 327, p. 27, § 52). It might even be feasible, following the same logic, to deny the "genuine and serious" nature of the dispute, which the judgment seems to imply at paragraph 67 where it refers to the possibility of bringing litigation (in Germany) as a "remote and unlikely prospect". I, for my part, prefer – following reasoning similar to that of my colleague, Judge Ress – to consider that the immunity from jurisdiction created by the "Settlement Convention" fully opposed the applicant having a right to a hearing of the merits of his case, given the nature and object of the legal action he had brought and the confiscation measure from which the loss of his title to the painting originated. Such reasoning on the subject of immunities does, moreover, feature in the case-law of the Convention institutions (see, in a case concerning parliamentary immunity, the Commission decision of X v. Austria of 6 February 1969, no. 3374/67, Yearbook 12, p. 247, or, in one concerning diplomatic immunity, N., C., F. and A.G. v. Italy, Commission decision of 4 December 1995, no. 4236/94, D.R. 84-B, p. 84).

Of course these immunities are and must remain exceptional. Such is the case here, however, for what is at issue? Movable property confiscated fifty-five years ago to which a claim was laid ten years ago (following fortuitous circumstances) before being barred by lack of jurisdiction under a treaty signed in 1952 prior to ratification by the respondent State of the European Convention of Human Rights. It has to be admitted that this type of immunity is infrequent.

I concede that my point of view should, strictly speaking, result in a finding that Article 6 § 1 is inapplicable rather than a finding that Germany has complied with it (but that is a technical point rather than one of principle, and the practical result is the same). I also admit that the reasoning of the judgment, which makes the lack of impairment of the essence of the right to a court dependent on the finding that there were only (not disproportionate) limitations on that right is not completely unprecedented in the case-law (there is a certain similarity with the Fayed

v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B). All things considered, however, I continue to prefer the line of decisions which seems to me the most orthodox, according to which an impairment of the very essence of the right of access to a court is sometimes not incompatible with Article 6, without it being necessary to review the proportionality aspect. I would add that, on the last point, I prefer the proposition that a treaty ("Settlement Convention") takes precedence over domestic law, or even that this was a case of quasi-*force majeure* (concurring opinion of Mr Ress), or, alternatively, a combination of the two, to bringing into play "the vital public interest in regaining sovereignty and unifying Germany" (paragraph 69). I fully recognise that interest and respect it entirely, but I sincerely doubt that the decisions given by the German courts in this case between 1995 and 1998 were absolutely necessary to make that interest prevail. The proportionality "test" seems to me, to be quite honest, somewhat artificial in the circumstances of the case.

That said, I maintain my opinion that Article 6 of the Convention has not been infringed.

Annex 2

AKU Case

Judgment of the German Federal Court of Justice (*Bundesgerichtshof*) of 13 December 19

1957 *Neue Juristische Wochenschrift (NJW)*, p. 217

Translation: 23 *ILR*, p.21

Recognition of Legislative Acts of Foreign States—Confiscation of Property in Special Circumstances—Confiscation of German Property by Netherlands Legislative Decree for Purpose of Reparation Due from Germany—Right of German Owners to Institute Proceedings for Return of Property—Paris Agreement of October 23, 1954, on Settlement of Matters Arising out of the Occupation of Germany—Competence of German Courts.

AKU CASE.

German Federal Republic, Federal Supreme Court. December 13, 1956.

THE FACTS.—The defendant Company, the Algemeene Kunstzijde Unie (AKU), was a company incorporated in the Netherlands. Before the Second World War AKU had acquired considerable interests in German companies, and as a result of exchanges of shares taking place in connection with the acquisition of such interests a large part of the share capital of AKU was owned by German shareholders. The plaintiffs were German nationals who owned shares in AKU and whose share certificates and other documents of title were deposited partly in Germany and partly in a German bank in the Netherlands. In 1944 the Netherlands Government enacted a Decree whereby "German enemy property" was confiscated and vested in the State of the Netherlands. In pursuance of this Decree the Powers occupying Germany after the Second World War handed such of the plaintiffs' shares in AKU (and other documents of title) as were in Germany to the Netherlands Government. The plaintiffs thereupon brought an action against AKU for a declaration that the confiscation of their shares was invalid; alternatively, that in any event it was of no legal effect in so far as concerned the assets of AKU situate in Germany, *viz.*, AKU's holdings in German companies, with the result that the plaintiffs were entitled to a share in AKU's German holdings in the proportion which such holdings bore to the total nominal value of AKU's share capital. AKU contended that the plaintiffs were not entitled to institute the present proceedings, on the ground that Article 3 (3) of Part 6 of the Paris Agreement of October 23, 1954, on the Settlement of Matters arising out of the Occupation of Germany (which is concerned with reparations payable by Germany) provided expressly that no action could be brought against foreign nationals who had acquired German property confiscated for the purpose of reparation or who had acted on the instructions of foreign (Allied) Governments.

Held: that as according to the Netherlands Decree the shares were confiscated for the purpose of reparation, and as according to the Paris Agreement the *situs* of the plaintiffs' assets was immaterial, the German Courts, by virtue of Article 3 (3) of Part 6 of the Paris Agreement, were precluded from adjudicating upon the plaintiffs' claim. The action must accordingly be dismissed.

The Court said: " The provision here referred to (Article 3 (3) of Part 6 of the Paris Agreement) excludes the competence of the German Courts to a greater extent than did Law No. 63 of the Allied High Commission. Law No. 63 was applicable only where the confiscated asset which was German-owned was situate *in a foreign State*. Article 3 of Part 6 of the Transitional Agreement (except for German property in Austria) is no longer subject to this condition. On the contrary, by paragraph 1 of this provision the Federal Republic renounced all objections to measures ' taken or to be taken against *German external or other property* which has been seized for the purpose of reparation ' or other purposes there named. Paragraph 3 provides that in such cases actions ' shall not be admissible ', which can only mean here (as in Article 3 of Law No. 63) that actions cannot be brought. Article 3 of Part 6 of the Transitional Agreement therefore includes—apart from the special measures against German external assets in Austria which are provided for in paragraph 2—measures of the kind referred to against German assets which are not situate abroad but in Germany itself. The sole condition, therefore, which must now be satisfied in order that the jurisdiction of the German Courts shall be excluded is that the claim is concerned with an asset seized for the purpose of reparation or one of the other purposes referred to in paragraph 1. Having regard to the fact that it is not disputed that the confiscations of German property in pursuance of the Netherlands Decree of October 20, 1944, were carried out for purposes of reparation, the question as to the admissibility of this action depends only on whether the holdings which are the subject of the proceedings must be deemed to have been confiscated by the Netherlands Decree to the extent to which they are still claimed by the plaintiffs. *This* question can be determined only by the law of the confiscating State, *viz.*, in this case by the law of the Netherlands. This is expressly laid down in Article 1 (1) (*a*) of Law No. 63, and applies equally to Article 3 of Part 6 of the Transitional Agreement. According to that provision the *situs* of the confiscated assets is relevant, if at all, only for the decision on the extent of the foreign confiscation which has to be made in accordance with the law of the confiscating State. For this reason the question of *situs* must also be determined in accordance with that foreign law. The judgment of this Senate of March 24, 1955 (BGHZ, vol. 17, p. 74; NJW, 1955, p. 868) is not contrary to this view. It is true that according to that judgment, where Law No. 63 has to be applied, the question as to whether the confiscated asset was situate abroad must be determined in accordance with German law, including the German rules of the conflict of laws, because Law No. 63 left it open to the German Courts to examine this prior condition of the applicability of that law in accordance with German law, but the position is different in the present case, where Article 3 of Part 6 of the Transitional Agreement has to be applied. This latter provision, as has already been pointed out, in contradistinction to Article 1 of Law No. 63, does not require that the confiscated asset shall be situate abroad. It accordingly does not confer a right to examine this question in accordance with German law. The appeal Court was therefore right and acted in accordance with the legal position resulting from the Transitional Agreement when it examined by reference to the law of the Netherlands the question whether the rights claimed by the plaintiffs were expropriated by the Netherlands. It determined this question in the sense that according to the law of the Netherlands the rights of the plaintiffs were extinguished to their fullest extent and that there was no severance of part of those rights, *viz.*, those of the assets of the defendant Company which are situate in Germany, which could be said not to have been affected by the confiscation."

The Court then dealt with the question whether it was entitled to enquire into the interpretation of Dutch law adopted by the Court below. This question, in accordance with the German law of procedure, was answered in the negative, as was the further question whether the Court had power to refuse the application of Dutch law on the ground that it was contrary to the German *ordre public*. The Court expressed the view that Article 3 of Part 6 of the Transitional Agreement left no room for an enquiry as to whether Dutch law was contrary to the German *ordre public*. The Court then said in conclusion: " As according to the foregoing the conditions of Article 3 of Part 6 of the Paris Transitional Agreement must be held to be present, the action is inadmissible by virtue of paragraph 3 of this provision. In the result, the judgments of the Courts below mu be affirmed and the action dismissed."

[Report: NJW, 10 (1957), p. 217.]

Annex 3

Judgment of the German Federal Court of Justice (*Bundesgerichtshof*)
of 11 April 1960
32 *Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ)*, p. 172
Translation by Counsel

German courts have no jurisdiction to declare that the property of the assets seized as German assets by the United States of America belonged prior to the seizure to the foreign Applicant and not to the German Defendant.

Convention on the Settlement of Matters Arising out of the War and Occupation as amended on 30 March 1955 (Federal Law Gazette (BGBl) II 301, 405), Chapter Six Article 3

II. Senate on civil matters. Judgment of 11 April 1960 concerning C. (Applicant) v. ST. Defendant). II ZR 64/58

I. Regional Court (Landgericht) Duisburg
II. Court of Appeal (Oberlandesgericht) Düsseldorf

By the Vesting Order No. 19258 of 13 April 1953 the United States of America seized assets on the basis of the Trading with the Enemy Act (hereafter "Act"). The assets were transferred initially to the Office of Alien Property Custodian and later to the Attorney General, Office of Alien Property of the Department of Justice.
The Plaintiff submitted a title-claim with the Department of Justice and a claim before the US District Court for the District of Columbia alleging that the vesting order relied on the erroneous assumption that the assets were in the property or under the control of the Defendant who came within the meaning of enemy under the Act. In fact, however, the assets concerned belonged to the Plaintiff. The Plaintiff did not come under the meaning of enemy in the sense of the Act. On 3 February 1955 the Defendant also submitted a title-claim.
The Plaintiff submitted two requests seeking a declaratory judgment. By the negative request she asks the court to declare that the Defendant was entitled neither on 11 December 1941 (the day on which the United States entered the War) nor during the time between that date and 13 April 1953 to submit a civil claim concerning the assets. By the positive request the Plaintiff asks, as a subsidiary means, to declare that she alone was entitled at the relevant dates to submit such a claim. Finally the Plaintiff asks as a further subsidiary request that a prohibition shall be issued for the Defendant to allege that she has been in possession of the assets until the seizure.
The claim was dismissed in each instance.

1. German courts are barred by the Convention on the Settlement of Matters Arising out of the War and Occupation – Settlement Convention- (Federal Law Gazette (BGBl) 1955 II, 405, 440) to decide on the claims of the Plaintiff. It is true that the Defendant does not belong to the persons explicitly mentioned in Art. 3 paragraph 3 of Chapter Six Settlement Convention. According to this provision no claim shall be admissible against persons who have acquired or transferred title to property on the basis of the measures referred to in paragraph 1; the same is true for claims against international organizations, foreign governments or persons who have acted upon instruction of such organizations or governments. The Defendant has not acquired or transferred title to property, but at the most she lost it; furthermore, she did not act upon instructions of international organizations or foreign governments. Nevertheless, German courts have no jurisdiction. Even if the conditions of Art. 3 paragraph 3 of Chapter Six Settlement Convention are not fulfilled, German courts lack jurisdiction in a case in which the Plaintiff is trying to raise an objection against measures mentioned in Art. 3 paragraph 1 of Chapter Six Settlement Convention. This Article provides that the Federal Republic "shall not raise objections against the

measures which have been, or will be, carried out with regard to German external assets or property seized for the purpose of reparation or restitution ...". The Plaintiff is seeking a judgment on such an objection. She tries primarily to reach a judgment declaring that the seizure carried out by the United States was illegal because the bonds seized were not the property of the German Defendant, but of herself, the foreign Plaintiff.

Art. 3 of Chapter Six Settlement Convention is not inapplicable for the reason that the provision concerns German assets and the Plaintiff challenges the seizure arguing that the assets were not German assets. For the application of this provision it is sufficient that the assets were seized as German assets. Art. 3 paragraph 1 of Chapter Six Settlement Convention concerns those measures which were directed against German assats as understood by the enemy-legislation of the State which seized the assets; whether the assets seized according to this legislation were in fact German or foreign assets is to be decided exclusively by the State which has seized the assets. The German courts cannot decide the question whether the claim of the Plaintiff is well founded on the basis of sec. 9 Act. Nor can German courts decide the preliminary question (what possibly could be relevant for the justification of the claim under sec. 9 Act) whether the assets seized belonged prior to the seizure to the foreign Plaintiff or to the German Defendant. If the foreign Plaintiff wants to raise claims against the seizure, the only available remedies are those which exist under the law of State which has seized the assets. The courts of the Federal Republic are not in a position to render a judgment on the legality of the seizure or intended to interfere with the decision of the foreign State concerning the legality of the seizure. In this context it is not necessary to answer the question whether the decision in BGHZ 8, 378 seq. has taken a different position: this decision is based exclusively on the interpretation of Law No. 63 of the Council of the Allied High Commission (ABl AHK No. 64 S. 1107), it is thus not concerned with the interpretation of the Settlement Convention which is, however, decisive in the present case.

Annex 4

Judgment of the German Federal Constitutional Court
of 23 April 1991,
84 *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)*, p. 90
Translation: 94 *ILR*, p.44

UNIFICATION TREATY CONSTITUTIONALITY CASE (MERITS)

(Case Nos 1 BvR 1170, 1174, 1175/90)

Federal Republic of Germany, Federal Constitutional Court (BVerfG)

(Herzog, *Presiding*; Henschel, Seidl, Grimm, Söllner, Dieterich,
Kühling, Seibert, *Judges*)

23 *April* 1991

SUMMARY: *The facts*:—A number of persons lodged constitutional complaints against certain provisions of the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic

Republic concerning the reunification of the two German States ("Unification Treaty"). In particular, they challenged a ruling contained in a Joint Declaration of the two German States on the Regulation of Open Property Issues of 15 June 1990, which formed an integral part of the Unification Treaty pursuant to Article 41(1), that expropriations carried out on the basis of sovereign occupation authority in the former Soviet Zone of Occupation (East Germany) between 1945 and 1949 were irreversible, so that restitution could no longer be sought by the individuals affected. The expropriations in question had affected about one third of all agricultural land in East Germany as well as some ten thousand industrial and commercial undertakings there.

The complainants alleged that the ruling at issue violated their fundamental rights under Articles 3, 14, 19, 20 and 79 of the Basic Law of the Federal Republic. They argued that the effect of the ruling was to destroy their legitimate claims and to incorporate into the legal system of the Federal Republic unjust and arbitrary communist land reforms involving expropriation without compensation, which could only become final if their fundamental rights were to be abandoned. Seventy per cent of all property expropriated remained publicly or co-operatively owned and, according to the complainants, could easily be returned to its original owners.

For its part, the Federal Government stressed that the inclusion of the ruling on expropriated property had been a precondition of both the Soviet Union and the German Democratic Republic for the successful conclusion of negotiations for German reunification. Bearing in mind that the achievement of reunification was enshrined as one of the tasks of the German people in the Preamble to the Basic Law, the Federal Government considered that the opportunity to achieve reunification might have been lost if this precondition had not been accepted.

Held:—The constitutional complaints were rejected.

(1) The ruling at issue, providing for the irreversibility of expropriations, had been expressly declared to be compatible with the Constitution by Article 143(3) of the Basic Law, which was inserted into the Basic Law by Article 4(5) of the Unification Treaty. That ruling could therefore only violate basic constitutional rights if Article 143(3) was itself invalid, but this was not the case. The competence of the Federal Government to negotiate a treaty providing for German reunification, and to include therein those amendments to the Basic Law necessary for the achievement of unity, was derived from the constitutional obligation to work towards reunification. The procedure followed was therefore constitutionally acceptable (pp. 56-7).

(2) Just like any other constitutional amendment, Article 143(3) had to comply with the requirements of Article 79(3) of the Basic Law, which laid down that certain basic principles should not be affected by constitutional amendments. These principles included equality before the law, respect for the rule of law and social justice. Nevertheless Article 79(3) required only that these principles should not be undermined. It did not prevent the legislature from positively moulding those principles by amending the Constitution and thereby introducing modifications for objectively justifiable reasons (pp. 57-8).

(3) Disregarding, for the moment, possible claims under international law, the legal position of the complainants was not, in fact, altered by the ruling in question. Both the authorities in the Soviet zone and subsequently the authorities in the German Democratic Republic had regarded the expropriations as lawful and as having effectively and finally deprived the complainants of their property (p. 59).

(4) The Federal Republic could not be held responsible for the expropriations, regardless of whether they were effected directly by the Soviet occupying authorities or involved an exercise of discretion by the appointed East German authorities. Although the Federal Republic had always proclaimed its responsibility for the whole of Germany (*cf.* Preamble to the Basic Law), that responsibility had in practice been limited by the Basic Law itself to the former territory of the Federal Republic (Article 23(1)). The Federal Republic could not therefore be held responsible for measures taken by the authorities on the territory of East Germany which, from the standpoint of the Federal Government, were unlawful or unconstitutional, just as it could never be held responsible for measures taken by the authorities of a foreign State. Furthermore, the measures in question could not be judged against the standards of the Basic Law, which had not yet entered into force at the time when most of those measures were taken (pp. 59-60).

(5) The private international law of the Federal Republic adopted the internationally recognized and constitutionally acceptable position that expropriations carried out by a foreign State, including confiscations without compensation, were effective within the area of territorial sovereignty of that State and affected all property subject to that sovereignty at the moment of expropriation (territoriality principle). Whilst there was an exception to this rule for reasons of public policy, it was inapplicable where there was an insufficient domestic connection (p. 60).

(6) No decision was required as to whether claims might have been brought against the occupying power by the affected persons under international law, and to what extent restitution might have been ordered. Such remedies had been unenforceable and therefore practically of no value. Even without Article 143(3) of the Basic Law, the legislature was therefore entitled to assent to the exclusion of such claims in order to bring about German reunification, which had a higher constitutional priority (p. 61).

(7) Where expropriation had involved the transfer of property to the Soviet occupying authorities, restitution was not within the power of the Federal Republic. But even where restitution was possible, it was not incumbent upon the Federal authorities to grant it. The legislature of the Federal Republic was required, in accordance with the fundamental principles enshrined in the Basic Law, to provide at the domestic level for the equalization of the burdens of war. In determining reparations payable for injustices committed by the previous State authorities, the Federal legislature might consider itself obligated to bring about an equalization of burdens which went further than the general system of reparation payments. But Article 79(3) of the Basic Law did not require restitution in kind. Reparations could still comply with the basic principles of the rule of law and social justice even if they did not involve the return of the expropriated

property, provided compensation was paid. Furthermore, the ruling being challenged did not exclude the possibility of restitution in appropriate individual cases (pp. 61-3).

(8) The fact that the German Democratic Republic and the Soviet Union had insisted upon the inclusion of the regulation at issue and that, after due consideration, the Federal Government had decided to accept this condition in order to achieve reunification, adequately justified the exclusion of restitution. The assessment of what was feasible according to the state of the negotiations was a matter for the responsible and considered decision of the Federal Government and was not subject to constitutional review (pp. 63-4).

(9) The regulation at issue did not contain any criteria regarding the scope and extent of compensation payments. The fact that this matter was expressly left over for future decision by the Federal legislature did not violate basic constitutional rights. There was no constitutional requirement to grant full compensation for the expropriations equivalent to restitution. In determining the amount of compensation payable the legislature enjoyed a wide measure of discretion and was entitled to take into account the overall financial commitments of the State. In evaluating damage to property it was also to be borne in mind that damage for which compensation was payable had also been caused to life, health, freedom and career development. Furthermore, the legislature should take account of the financial requirements of extremely costly new tasks of the Federal Republic related to the reconstruction of the *Länder* which had formerly been part of the German Democratic Republic. All these considerations applied to restrict the amount of compensation which was constitutionally required (pp. 65-6).

(10) It was not relevant that part of the expropriated property remained in public ownership. Former owners could not take advantage of the fortunate coincidence that their property was still available, in order to claim preferential treatment with regard to the level of their reparations over other expropriated persons and those who had suffered other forms of injury (p. 66).

The following is the text of the relevant part of the judgment of the Court:

[91] OPERATIVE PART OF THE JUDGMENT

The constitutional complaints are rejected.

The Federal Republic of Germany shall reimburse to the parties one quarter of the necessary expenses which they have incurred.

GROUNDS

A.

... [following: p.56]

[117] C.

The constitutional complaints are unfounded.

I.

[The Court rejected the constitutional complaint of complainant No 11 in Case No 1 BvR 1174/90 on the ground that he had not adequately documented how he was personally affected by the treaty regulation at issue. The other complainants were held to have adequately furnished proof of this aspect of their claims. The Court continued:]

II.

The regulation contained in the Unification Treaty (Article 41(1) in conjunction with paragraph 1, first sentence, of the Joint Declaration contained in Annex III) which determines that expropriations carried out on the basis of the law imposed by the occupying powers or sovereign occupation authority (between 1945 and 1949) shall henceforth be irreversible, does not infringe the basic rights upon which the complainants rely. This regulation was **[118]** expressly declared to be compatible with the Constitution by Article 143(3) of the Basic Law, which was inserted into the Basic Law by Article 4(5) of the Unification Treaty. That regulation could therefore only violate the Constitution (and the basic rights thereunder) if Article 143(3) of the Basic Law was itself invalid.

This is not the case.

1. From the formal standpoint, there are no serious reservations to the provision in question.

(a) The procedure adopted by the Federal Government was to insert "amendments to the Basic Law subject to accession" in the Unification Treaty. Consequently the Lower House of the German Parliament (*Bundestag*) could only consent to it by means of a law of assent enacted pursuant to Article 59(2) of the Basic Law. The legal basis for this procedure was provided by the former Article 23, second sentence, of the Basic Law taken in conjunction with the reunification requirement of the Basic Law [contained in its original Preamble], so that it was constitutionally unobjectionable (*cf.* 82 *BVerfGE*, 316 at 320). In these circumstances the entry into force of the Unification Treaty constituted the precondition for the exercise of the opportunity to establish German unity. The competence of the Federal Government to negotiate such a treaty, and include therein those amendments of the Basic Law necessary for the achievement of unity, was derived from the constitutional obligation to work towards German reunification (*cf.* 36 *BVerfGE*, at 18[3] and 77, and 137 at 149[4]). That competence was exercised by the Federal Government, making its own assessment of the position, within the framework of the negotiations with German Democratic Republic and the Soviet Union.

[The Court then considered a number of other constitutional aspects of the form and procedure adopted for the enactment of the provisions at issue, including the fact that the constitutional amendments and the ratification of the Unity Treaty had been linked together, the speed of the ratification process, and the manner in which the constitutional amendments had been included in the Unity Treaty. The Court concluded that the form and procedure adopted were constitutionally acceptable and continued:]

[120] 2. The substance of Article 143(3) of the Basic Law must, in the same way as every other constitutional amendment, be examined

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[[3] 78 *ILR* 149 at 162.]
[[4] 91 *ILR* 211 at 221.]

from the standpoint of the requirements of Article 79(3) of the Basic Law. The formulation contained in Article 143(3), that the irreversibility of expropriations is valid notwithstanding the provisions of Article 143(1) and (2), cannot be understood as excluding the application of Article 79(3) of the Basic Law, which is expressly referred to in Article 143(1). In amending the Constitution, the legislator would never have been authorized to disregard in such a way the prescribed limitations upon constitutional amendment of the Basic Law.

(a) Article 79(3) of the Basic Law prohibits constitutional amendments **[121]** by which the principles laid down in Articles 1 and 20 of the Basic Law are affected. This includes the principle of human dignity embodied in Article 1(1) of the Basic Law. Also of importance is the acknowledgment in Article 1(2) of inviolable and inalienable human rights as the basis of every community, and of peace and justice in the world. Taken in conjunction with the statement in Article 1(3) that the basic rights enumerated subsequently in the Basic Law are binding as directly enforceable law, the guaranteed protection of those rights is established as a basic principle not subject to any limitation since they are indispensable for the maintenance of order in accordance with Article 1(1) and (2). Just like the original drafters of the Constitution, those amending the Constitution cannot disregard fundamental postulates of justice . . . which include the principle of equality before the law and the unlawfulness of arbitrary rule . . . Also to be respected are the basic principle of the rule of law and the principle of social justice and the welfare State, enshrined in Article 20(1) and (3) of the Basic Law. Nevertheless Article 79(3) of the Basic Law requires only that these principles should not be undermined. It does not prevent the legislator from engaging in positive legal moulding of these principles by amending the Constitution and thereby modifying them for objectively justifiable reasons (*cf.* 30 *BVerfGE* 1 at 24).

(b) The regulation contained in the first sentence of the first paragraph of the Joint Declaration prohibits the treatment of expropriations as void and also excludes final settlement of their effects by the return of the expropriated property. On the other hand, the regulation does not prohibit the payment of compensation for the value of the assets lost. Such compensation, whose level is not determined, is explicitly reserved, in the fourth sentence of the first paragraph of the Joint Declaration, as a matter for the legislature (*cf.* also the order made by the Federal Constitutional Court in proceedings concerning a petition for an interim injunction of 11 December 1990, 83 *BVerfGE* 162 at 172).

The above-mentioned restrictions contained in Article 79(3) of the Basic Law were not violated by the legislature in amending the

Constitution **[122]** so as to declare the regulation concerning the expropriations constitutionally legitimate.

(aa) Disregarding for the moment possible claims on the basis of international law, the legislator has not brought about any further interference with the legal position of the persons affected simply by enacting the regulation being challenged. From this standpoint any constitutional flaw is to be excluded from the start.

(1) The question of whether someone is entitled to a certain [protected] legal position can only be answered in relation to a concrete legal order. According to the legal situation on the territory of the former Soviet zone of occupation and subsequently the German Democratic Republic, such legal positions no longer existed following the execution of the expropriation measures. The acts of expropriation were intended to deprive the owners of their legal positions completely and finally. The normative basis upon which the expropriations were carried out was considered by both the occupying power as well as the German authorities in the Soviet zone of occupation, and subsequently in the German Democratic Republic, as entirely lawful. Even in so far as the relevant legal basis was interpreted excessively or gave rise to measures of an arbitrary nature violating the rule of law . . . it was basically impossible to obtain any legal protection and expropriations carried out in such circumstances were treated as entirely valid.

(2) The expropriations carried out on the territory of the Soviet zone of occupation cannot be imputed to the sphere of responsibility of the Federal Republic of Germany, which is the responsible State authority under the Basic Law. This is true regardless of whether the expropriations were effected directly by the Soviet occupying power or involved the exercise of an element of discretion left to the appointed German authorities by the occupying power. Certainly the Federal Republic has always felt responsible for the whole of Germany, in accordance with the terms of the Preamble of the Basic Law (*cf.* 36 *BVerfGE* 1 at 16.[5] But the extent of its State authority has hitherto been restricted, not only in fact but also from the standpoint of constitutional law, to the former territory of the Federal Republic (Article 23(1) of the Basic Law). The Federal Republic was therefore in no way responsible, in the sense of being required to accept liability **[123]** for measures of the German authorities in the Soviet zone of occupation, which from its point of view were illegal or unconstitutional, just as it could never be held responsible for measures taken by the authorities of a foreign State (*cf.* 43 *BVerfGE* 203 at 209). Furthermore, for the most part the expropriation measures in question cannot be judged against the standards contained in the Basic Law because, at

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[[5] 78 *ILR* 149 at 161.]

the time those measures were taken, the Basic Law was not yet in force.

(3) According to the legal situation which existed in the western zone of occupation, and subsequently in the Federal Republic, the persons affected by expropriations were likewise left with no enforceable protected legal position.

According to German international expropriation law, expropriations carried out by a foreign State, including "confiscations" without compensation, are regarded in principle as effective provided that the State in question has not exceeded the limits of its power. According to this principle, an expropriation is effective within the area of territorial sovereignty of a foreign State and affects property which at the moment of the expropriation was subject to the territorial sovereignty of the expropriating State (territoriality principle) (*cf.* *OGH BrZ, NJW* 1949, p. 502; 20 *BGHZ* 4 at 12; 25 *BGHZ* 134[*] at 140 and 143; 31 *BGHZ* 168 at 171; 39 *BGHZ* 220 at 227; *BGH, MDR* 1972, p. 494 . . .). Acquiescence to foreign expropriations is restricted in this regard only by the exception for the benefit of public policy (Article 30 of the Introductory Law to the German Civil Code *EGBGB* (old version) taken in conjunction with Article 220(1) *EGBGB* (new version) and Article 6 *EGBGB* (new version)). This exception is only applicable, however, where and in so far as there exists a sufficient domestic connection . . . The lack of compensation for the expropriation or some other impropriety according to domestic conceptions of justice is therefore not sufficient of itself, in so far as the expropriation affects property within the territory of the expropriating State **[124]** to deprive it of its effectiveness (*cf.* 62 *BGHZ* 340 at 343).

This clear-cut legal position does not give rise to any constitutional reservations. The validity of the territoriality principle is based upon the interest in preserving international order (*cf.* Seidl-Hohenvelderen *Internationales Konfiskations—und Enteignungsrecht*, p. 9 *et seq.* and Kegel/Seidl-Hohenvelderen, *Festschrift für Ferid* 233 at 244) and is also binding upon the constitutional order of the Federal Republic. There are no conflicting supranational principles of law. On the contrary, the territoriality principle, which determines in the sense described the effect of expropriations including confiscations without compensation, is internationally recognized (*cf.* *OGH BrZ*, *loc.cit.* and 62 *BGHZ* 340 at 343). Even where, as the complainants assert, the expropriation measures at issue were aimed from the start at reshaping the nature of commercial relationships for the purpose of creating a socialist order, different considerations do not apply. It is particularly to be expected, because of the nature of such a change in the social

[*] 24 *ILR* 31.]

order, that either none or minimal compensation would be paid because otherwise the intended social redistribution would be frustrated. For another State to acquiesce to such a redistribution, where its effects are brought into question on the territory of that State, not only the German international law of expropriation but also (and decisively) international legal practice do not regard it as critically important to establish that the measures in question are compatible with the constitutional order of the other State (*cf.* references in *Festschrift für Raape,* 1948, 93 at 95 to the jurisprudence concerning socialization measures in Russia following the First World War).

(bb) No decision is required as to whether, according to the principles of international law, claims by the affected persons might have been brought against the occupying power, to what extent the return of the property in question might have been ordered and whether the possibility of such claims was removed by the regulation at issue. Even without that regulation, such claims were at all events **[125]** unenforceable and therefore practically of no value. Even without Article 143(3) of the Basic Law, the legislator was therefore entitled to assent to the exclusion of such claims in order to bring about the reunification of Germany, which from the standpoint of constitutional law constituted a requirement of a high rank (*cf.* 41 *BVerfGE* 126 at 166 *et seq.*).

(cc) Neither is there any violation of Article 79(3) of the Basic Law from the standpoint of the *ex post facto* rectification of an earlier injustice, in the fact that the regulation in question does not require the expropriated property to be returned to its former owners or their successors in title. Where the expropriations were carried out for the benefit of the Soviet occupying power and the property is outside the sphere of influence of the Federal Republic, this conclusion follows from the lack of any possibility of the return of the property. But even where restitution in kind were possible, Article 79(3) would not be an obstacle to its exclusion.

(1) In its jurisprudence concerning the law on the consequences of war, and on the basis of its examination of regulations concerning the settlement of compensation for occupation and reparations, the Federal Constitutional Court has decided that the legislature of the Federal Republic is required, in accordance with the order of values contained in the Basic Law and having regard in particular to the principle of social justice and the welfare State enshrined in Article 20(1), to provide at the domestic level for the equalization of the burdens of war (*Lastenausgleich*). The legislature is not, however, required to accept responsibility for damage arising from the war in the same manner as if that damage had been caused by the organs of the Federal Republic. In arranging for the equalization of the

burdens of war the legislature enjoys a wide measure of discretion and may determine those measures of equalization which are possible by taking into account all remaining burdens and the financial requirements for future tasks (*cf.* 27 *BVerfGE* 253 at 270 and 283 *et seq.*; 41 *BVerfGE* 126 at 150 *et seq.* 15 *BVerfGE* 126 at 140 *et seq.*, in connection with the jurisprudence concerning the fulfilment of the obligations of the German Reich; and 27 *BVerfGE* 253 at 285 *et seq.* for further references). In so far as these basic principles are not already complied with by the existing provisions of the law on the equalization of war burdens, they are taken into account in the reservation in sentence four of paragraph one [of the Joint Declaration] with regard to the settlement of the equalization of burdens.

[126] (2) Nevertheless having taken over authority for a political system founded on a different order of ideas, whose measures were unacceptable according to the standards of the rule of law, the legislature bound by the Basic Law is entitled, however, to consider itself obligated to bring about an equalization of burdens which goes further than the general system of reparations payments (*cf.* 13 *BVerfGE* 31; 13 *BVerfGE* 39 at 42 concerning reparations payments for Nazi injustice; *cf.* also 27 *BVerfGE* 253 at 270 and 283 *et seq.* concerning compensation for military occupation and 41 *BVerfGE* 126 at 150 *et seq.* concerning reparations payments). The regulation contained in the Unification Treaty concerning expropriations without compensation not covered by paragraph one of the Joint Declaration is based on this fundamental principle.

It need not be decided here to what extent there is a constitutional duty for the legislature to establish a right to reparations payments for the expropriations in question (*cf.* Badura, *DVBl.* 1990, 1256 at 1262). At any rate it can be stated that Article 79(3) of the Basic Law does not require restitution in kind by means of the return of the expropriated property. The legislature generally enjoys a wide measure of discretion in determining the appropriate reparations for any injustice for which the previous State authorities are responsible (*cf.* 13 *BVerfGE* 39 at 43; 27 *BVerfGE* 253 at 270 and 283; and 41 *BVerfGE* 126 at 150 and 153). The same considerations apply with regard to the method of payment of any compensation.

Reparations for injustice committed by the previous authorities can only be based upon the principles of the rule of law and social justice. The essential elements of these principles, which must be taken into account by the legislature in amending the Constitution, are at any rate not violated simply because the question of existing expropriations is not solved by means of restitution in kind.

The constitutional guarantee of property ownership does not lead to a different conclusion in this regard. Reparations do not flow from individual basic rights but are rather exclusively derived from considerations of the rule of law and social justice. Even if the guarantee of property ownership were to have been infringed, it could not be derived from the essence of the guarantee contained in Article 79(3) of the Basic Law that **[127]** reparations by means of restitution in kind must follow (*cf.* also Papier, *NJW* 1991, 193 at 197). Furthermore, the regulation being challenged does not exclude the possibility that, within the framework of the intended system of equalization, former rights of ownership may be restored by reacquisition of the property where in individual cases that is possible and appropriate by reason of the nature of the interests involved.

(3) Doubts from the constitutional standpoint, with regard to the exclusion of restitution contained in the first paragraph of the Joint Declaration, do not arise from the fact that, for those expropriations without compensation not covered by this regulation, restitution of the expropriated property is provided for, at any rate in principle (see above Section A I. 1.(b)). The basic elements of the principle of equality, which are inviolable according to Article 79(3) of the Basic Law, are not infringed by this solution. The fact that the German Democratic Republic and the Union of Soviet Socialist Republics insisted upon the inclusion of this regulation, and the Federal Government after due consideration decided that it had to accept this condition in order to achieve German reunification, adequately justifies the exclusion of restitution in the regulation being challenged.

The statements made at the oral hearing by Federal Minister Dr Kinkel, former Prime Minister de Maizière and State Secretary Dr Kastrup confirm the position taken by the Federal Government that, during the negotiations for the Unification Treaty and the Two-plus-Four Negotiations, without the successful conclusion of which German unity could not have been achieved, the exclusion of restitution was a precondition of both the German Democratic Republic and the Soviet Union. Both States clearly set out the reasons for their attitude. The German Democratic Republic in particular attached great importance to not endangering the social peace on its territory by reopening the question of the legality of property rights created by the expropriations. The main consideration for the Soviet Union, on the other hand, **[128]** as was apparent from the statements of State Secretary Dr Kastrup, was that the measures in question were carried out under its sovereign authority as an occupying power and corresponded with legal, economic and commercial policy considerations which it was not prepared to ignore at the behest of what was at that time a defeated Germany. In these circumstances the Federal Government considered that the opportunity of achieving German reunification might have been lost if this condition would not have been accepted. The assessment of what was feasible according to the state of the negotiations was a matter for the responsible and considered decision of the Federal Government and is not subject to review from the standpoint of constitutional law (*cf.* 40 *BVerfGE* 141 at 178;[7] 66 *BVerfGE* 39 at 61).

III.

The regulation contained in Article 41(1) of the Unification Treaty, taken in conjunction with paragraph one, sentence four, of the Joint Declaration, providing that the decision concerning possible payments of compensation by the State is reserved to the [German] legislature, likewise does not violate the basic rights of the complainants.

1. The complainant correctly asserts that, in the circumstances of the case, the question of whether or not the legislature should enact an equalization regulation for the persons affected [by the expropriations] is not a matter for its free decision but is governed by the requirement of equality of treatment contained in Article 3(1) of the Basic Law.

(a) The principle of equality is directly applicable in this respect. In accordance with Article 135a(2), inserted into the Basic Law by Article 4(4) of the Unification Treaty, the legislature is empowered to decide that certain liabilities of the German Democratic Republic shall not be discharged. The liabilities in question are not only those of the German Democratic Republic, but also liabilities of the Federation connected with the transfer of assets of the German Democratic Republic to the Federation, the *Länder* and the local authorities, and liabilities arising from measures taken by the German Democratic Republic or its legal entities. It results from the accompanying materials that this constitutional norm should also be of importance for the settlement of the terms of compensation that must be made **[129]** in connection with the implementation of the Joint Declaration (*cf.* Memorandum to the Unification Treaty (in German), *BTDrucks.* 11/7760, 355 at 359). That constitutional norm does not, however, exempt the legislature from the obligation to adhere in its application to the general principle of equality (*cf.* 15 *BVerfGE* 126 at 145, with regard to Articles 134 and 135a(1) of the Basic Law).

The legislature has decided upon a reparations regulation, for those expropriations without compensation not covered by the regulation contained in the first sentence of paragraph one of the Joint Declaration, which takes as its starting point the principle of the return of the expropriated property (*cf.* above Section A I. 1.(b)). This may also be significant for the level of compensation to be granted in place of restitution. Having chosen such a solution, the legislature should not then exclude all forms of reparations for

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[[7] 78 *ILR* 176 at 193.]

expropriations without compensation carried out on the basis of the law imposed by the occupying powers or sovereign authority. The deficiencies from the standpoint of the rule of law which both groups of expropriations exhibit, according to the concept of justice of the legislature bound by the Basic Law, may be different. But these differences cannot at any rate justify unequal treatment on such a scale to the detriment of the complainants. Other factors which may be relied upon in support of such a difference of treatment, such as the fact that the expropriations being challenged go further back in time and were brought about or at least covered by the exercise of sovereign power by an occupying authority, could not justify from the standpoint of Article 3(1) of the Basic Law the exclusion of all compensatory equalization payments for the expropriations.

(b) The regulation contained in the fourth sentence of paragraph one of the Joint Declaration does not, however, prevent the legislature from complying with these constitutional requirements in determining the level of compensatory equalization payments. The wording of that regulation reflects the views of the Federal Government at the time of the treaty negotiations. In so far as it may also have a direct normative significance, this can only lie in the clarification that the regulation contained in the first sentence of the provision does not **[130]** prohibit the introduction of a system of compensatory equalization payments. On the other hand, the fourth sentence of paragraph one of the Joint Declaration does not settle the scale or extent of those payments (*cf.* the order of the Federal Constitutional Court of 11 December 1990 in proceedings concerning petitions for an interim injunction (83 *BVerfGE* 162 at 172-3)).[a] The reports presented during the oral hearings, concerning the course of the treaty negotiations, also show that no specific regulation of the compensatory equalization payments was ever demanded by either the German Democratic Republic or the Soviet Union.

A justiciable complaint could therefore only arise from the fourth sentence of paragraph one of the Joint Declaration if there had been a constitutional requirement to settle the reserved question of equalization payments immediately upon the accession of the German Democratic Republic. But such an obligation for the legislature cannot be derived from the Constitution.

2. The criticism of the complainants that the regulation contained in the fourth sentence of paragraph one of the Joint Declaration violates their basic rights, in so far as constitutionally required full compensation is excluded by the reservation in favour of mere compensatory equalization payments, is unfounded. On the one hand, as already shown, the regulation contains no criteria regarding

[[a] See Note at p. 67.]

the scope and extent of the compensatory payments. Furthermore, it is not possible to deduce from the Basic Law any requirement to grant full compensation for the expropriations in question.

When determining the amount of reparations payments the legislature must also take into account, within the framework of the exercise of its powers of decision, the financial capabilities of the State bearing in mind the other functions which it must fulfil. The principles developed for granting compensation for damage caused by the war are accordingly applicable (*cf.* 38 *BVerfGE* 128 at 133 with reference to 27 *BVerfGE* 153 at 184 *et seq.*). The legislature is allowed to take into account the total amount of damage for which reparations must be paid, which includes not only damage to property but other categories of damage. **[131]** In evaluating damage to property it must be borne in mind that at the time in question other assets including life, health, freedom and career development were also affected (*cf.* 27 *BVerfGE* 253 at 285). Furthermore, the legislature must also take account of the fulfilment of new tasks related to reconstruction in the new *Länder* of the Federal Republic. In evaluating the economic and financial position of the State and the importance to be attached to individual State functions, the legislature enjoys especially wide discretion (*cf.* 13 *BVerfGE* 39 at 43). In view of the wretched economic state of the new *Länder* of the Federal Republic which, in accordance with present levels of subsidy, it will require hundreds of thousands of millions of marks to rectify, there is no (original) constitutional obligation to grant reparations equivalent in value to full restitution. At any rate the legislature must observe Article 3(1) of the Basic Law in determining the whole reparations regulation.

The fact that part of the expropriated property is in public ownership does not assist the complainants' cause. The economic bankruptcy caused by mismanagement in the former German Democratic Republic, for which the Federal Republic is not responsible, will not be removed simply by taking account of these property items. Neither can the former owners take advantage of the fortunate coincidence that their property is still available, in order to claim preferential treatment, with regard to the level of their reparations over other persons who have suffered from expropriation, or who were the victims of measures of injustice who have suffered other forms of damage. The same restrictive considerations would apply to granting such persons the possibility of re-acquiring their former property.

IV.

After what has been stated above, a decision is no longer required as to whether Article 135a(2) of the Basic Law is compatible with Article 79(3) from the standpoint under discussion. As already shown, that provision does not exempt **[132]** the legislature from being bound by the principle of equality. Neither does it altogether prevent the legislature from establishing a system of compensatory equalization payments compatible with the Constitution. To the extent that such a provision might still have an unfavourable impact upon the complainants, such a situation would not arise directly from the constitutional norm at issue here but rather, for example, from inadequate legal regulations.

Neither is it necessary to examine from the standpoint of constitutional law further provisions relied upon by the complainant in Case No 1 BvR 1174/90 in support of their constitutional complaint (*cf.* above Section A.IV.2). The further arguments put forward do not disclose any independent cause of complaint not based on the regulation contained in paragraph one of the Joint Declaration. Since that regulation is compatible with the Constitution, none of the other provisions relied upon requires any further consideration.

V.

[The Court made an order for reimbursement of part of the necessary expenses incurred by the complainants, pursuant to Section 34(a)(3) of the Law on the Constitutional Court (*BVerfGG*).]

This decision was reached unanimously.

[Reports: 84 *BVerfGE* p. 90; 1991 *NJW* p. 1597 (in German)]

Note:—The above judgment of the Federal Constitutional Court on the merits of the constitutional complaints was preceded a few months earlier by a judgment of the same Court rejecting an application by some of the complainants for an interim injunction prohibiting the application of certain provisions of the Unification Treaty pending the Federal Constitutional Court's final decision on the complaints. The Court applied a test laid down in its earlier judgment of 22 May 1972 in the ***East-Treaties Constitutionality Case*** (73 *ILR* 691 at 693) for determining whether or not such an injunction would satisfy the conditions contained in Article 32(1) of the Law on the Federal Constitutional Court (*BVerfGG*). Particularly strict standards had to be applied where the postponement of the entry into force of a legal enactment was sought, especially where the enactment had important consequences from the standpoint of international law or public policy.

There was a danger that, if an injunction was not granted and the constitutional complaints were subsequently successful, restitution of the complainants' expropriated property might have meanwhile become impossible. At the same time, the Joint Declaration by the two German Governments preserved the possibility that the complainants might be able to obtain full compensation if this was constitutionally required. On the other hand, particularly important considerations of public interest would be prejudiced if an interim injunction was issued and the constitutional complaints were later held to be unfounded. Such an injunction would increase the uncertainty concerning property rights in the former German

Democratic Republic and run the risk of stifling further economic investment there. Furthermore, an interim injunction could be harmful to the foreign policy of the Federal Republic, bearing in mind how strongly both the German Democratic Republic and the Soviet Union had insisted upon the inclusion of the regulation at issue during the negotiations for German reunification. Such an injunction would damage confidence in the reliability of the Federal Republic in international relations and, in particular, could appreciably disturb relations between the Federal Republic and the Soviet Union with harmful consequences for future co-operation. These foreign policy considerations carried decisive weight, in the opinion of the Court, against the granting of an injunction (*Unification Treaty Constitutionality Case (Interim Measures)*, (No 1 BvR 1170, 1174, 1175/90), judgment of 11 December 1990, 83 *BVerfGE* 162 at 171-4).

Annex 5

Karel des Fours Walderode v. Czech Republic

Human Rights Committee, Communication no. 747/1997: Czech Republic. 02/11/2001

(UN. Doc. CCPR/C/73/D/747/1997)

**UNITED
NATIONS**

CCP

**International Covenant
on Civil and
Political Rights**

Distr.
GENERAL

CCPR/C/73/D/747/1997
2 November 2001

Original: ENGLISH

Communication No 747/1997 : Czech Republic. 02/11/2001. CCPR/C/73/D/747/1997. (Jurisprudence)

Convention Abbreviation: CCPR

texte en Français *texto español*

Human Rights Committee

Seventy-third session

15 October - 2 November 2001

ANNEX*

Views of the Human Rights Committee under article 5, paragraph 4,

of the Optional Protocol to the International Covenant

on Civil and Political Rights

- Seventy-third session -

Communication No. 747/1997

Submitted by: Dr. Karel Des Fours Walderode (deceased in February 2000) and his surviving spouse Dr. Johanna Kammerlander (counsel)

Alleged victims: The author and his surviving spouse

State Party: The Czech Republic

Date of Communication: 21 November 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 2001,

Having concluded its consideration of communication No. 747/1997, submitted to the Human Rights Committee by the late Dr. Karel Des Fours Walderode and Dr. Johanna Kammerlander under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The original author of the communication was Dr. Karel Des Fours Walderode, a citizen of the Czech Republic and Austria, residing in Prague, Czech Republic. He was represented by his spouse, Dr. Johanna Kammerlander, as counsel. He claimed to be a victim of violations of article 14, paragraph 1, and article 26 of the International Covenant on Civil and Political Rights by the Czech Republic. The Covenant was ratified by Czechoslovakia in December 1975, the Optional Protocol in March 1991. (1) The author passed away on 6 February 2000, and his surviving spouse maintains the communication before the Committee.

The facts as submitted

2.1 Dr. Des Fours Walderode was born a citizen of the Austrian-Hungarian empire on 4 May 1904 in Vienna, of French and German descent. His family had been established in Bohemia since the seventeenth century. At the end of the First World War in 1918, he was a resident of Bohemia, a kingdom in the former empire, and became a citizen of the newly created Czechoslovak State. In 1939, because of his German mother tongue, he automatically became a German citizen by virtue of Hitler's decree of 16 March 1939, establishing the Protectorate of Bohemia and Moravia. On 5 March 1941, the author's father died and he inherited the Hruby Rohozec estate.

2.2 At the end of the Second World War, on 6 August 1945, his estate was confiscated under Benes Decree 12/1945, pursuant to which the landed properties of German and Magyar private persons were confiscated without any compensation. However, on account of his proven loyalty to Czechoslovakia during the period of Nazi occupation, he retained his Czechoslovak citizenship, pursuant to paragraph 2 of Constitutional Decree 33/1945. Subsequently, after a Communist government came to power in 1948, he was forced to leave Czechoslovakia in 1949 for political and economic reasons. In 1991, after the "velvet revolution" of 1989, he again took up permanent residence in Prague. On 16 April 1991 the Czech Ministry of Interior informed him that he was still a Czech citizen. Nevertheless, Czech citizenship was again conferred on him by the Ministry on 20 August 1992, apparently after a document was found showing that he had lost his citizenship in 1949, when he left the country.

2.3 On 15 April 1992, Law 243/1992 came into force. The law provides for restitution of agricultural and forest property confiscated under Decree 12/1945. To be eligible for restitution, a claimant had to have Czech citizenship under Decree 33/1945 (or under Law 245/1948, 194/1949 or 34/1953), permanent residence in the Czech Republic, having been loyal to the Czechoslovak Republic during the period of German occupation, and to have

Czech citizenship at the time of submitting a claim for restitution. The author filed a claim for restitution of the Hruby Rohozec estate within the prescribed time limit and on 24 November 1992 concluded a restitution contract with the then owners, which was approved by the Land Office on 10 March 1993 (PU-R 806/93). The appeal by the town of Turnov was rejected by the Central Land Office by decision 1391/93-50 of 30 July 1993. Consequently, on 29 September 1993 the author took possession of his lands.

2.4 The author alleges State interference with the judiciary and consistent pressure on administrative authorities and cites in substantiation from a letter dated 29 April 1993 by the then Czech Prime Minister Vaclav Klaus, addressed to party authorities in Semily and to the relevant Ministries, enclosing a legal opinion according to which the restitution of property confiscated before 25 February 1948 was "legal", but nevertheless "unacceptable". The author states that this political statement was subsequently used in court proceedings. The author further states that, because of increasing political pressure at the end of 1993 the Ministry of Interior reopened the issue of his citizenship. Furthermore, the former owners of the land were persuaded to withdraw their consent to the restitution to which they had previously agreed.

2.5 On 22 December 1994 the Public Prosecutor's Office in the Semily District filed an application with the District Court under paragraph 42 of Law 283/1993 to declare the Land Office's decision of 10 March 1993 null and void. On 29 December 1994, the District Court rejected this application. On appeal, the matter was referred back to the first instance.

2.6 On 7 August 1995, a "citizens' initiative" petitioned revision of the Semily Land Office's decision of 10 March 1993. On 17 October 1995, the Central Land Office examined the legality of the decision and rejected the request for revision. Nevertheless, on 2 November 1995 the author was informed by the Central Land Office that it would, after all, begin to revise the decision. On 23 November 1995, the Minister of Agriculture annulled the Semily Land Office decision of 10 March 1993, purportedly because of doubts as to whether the author fulfilled the requirement of permanent residence, and referred the matter back. On 22 January 1996, the author applied to the High Court in Prague against the Minister's decision.

2.7 On 9 February 1996, Law 243/1992 was amended. The condition of permanent residence was removed (following the judgement of the Constitutional Court of 12 December 1995, holding the residence requirement to be unconstitutional), but a new condition was added, of uninterrupted Czechoslovak/Czech citizenship from the end of the war until 1 January 1990. The author claims that this law specifically targeted him and submits evidence of the use of the term "Lex Walderode" by the Czech media and public authorities. On 3 March 1996 the Semily Land Office applied the amended Law to his case to invalidate the restitution agreement of 24 November 1992, since Dr. Des Fours did not fulfil the new eligibility requirement of continuous citizenship. On 4 April 1996, the author lodged an appeal with the Prague City Court against the Land Office's decision.

2.8 As regards the exhaustion of domestic remedies, the late author contended that the proceedings were being deliberately drawn out because of his age and, moreover, that the negative outcome was predictable. He therefore requested the Committee to consider his communication admissible, because of the delay in the proceedings and the unlikelihood of the effectiveness of domestic remedies.

The complaint

3.1 The late author and his surviving spouse claim that the restitution of the property in question was annulled for political and economic reasons and the legislation was amended to exclude him from the possibility of obtaining redress for the confiscation of his property. It is claimed that this constitutes a violation of article 26 of the Covenant, as well as of article 14, paragraph 1, because of political interference with the legal process (such as the Minister's decision of 23 November 1995). In this context, the author also refers to the long delays in the hearing of his case.

3.2 Further, he claims that the requirement of continuous citizenship for the restitution of property is in violation of article 26 of the Covenant and refers to the Committee's jurisprudence on this point. The author also claims that the restitution conditions applying to him are discriminatory in comparison with those applying to post-1948 confiscations.

The State party's observations

4.1 By submission of 13 June 1997, the State party noted that the author appealed to the Prague City Court from the decision of the District Land Office in Semily of 8 March 1996. As of June 1997, the proceedings were not completed, since the Land Office could not send the files concerning the case to the City Court, since these were still with the High Court.

4.2 Considering that the author commenced proceedings in the High Court in January 1996 against the decision of the Minister of Agriculture to annul the restitution, and that by December 1996, the preparatory stage of obtaining all necessary documentary evidence was completed, the State party argued that no undue prolongation had occurred.

4.3 The State party indicated that remedies exist when the author feels that the proceedings are being intentionally delayed. The author could have complained to the Chairman of the court, from where a possibility of review with the Ministry of Justice exists. Another remedy available to the author is a constitutional complaint, which may be accepted even if he has not exhausted domestic remedies if the application of remedies is unduly delayed and he has suffered serious harm as a result.

4.4 According to the State party, the rights invoked by the author are rights that can be asserted through a constitutional complaint, since international treaties regarding human rights are directly applicable and superior to law.

4.5 The State party rejects the author's suggestion that any attempts to assert his rights through the courts is useless because of the political interference with the judicial process. As regards the Prime Minister's letter concerning the interpretation of Law No. 243/1992, the State party denies that this letter was a political instruction for the courts. It notes that the letter was not addressed to a court and that it was merely a reply to an information request from the chairman of the local branch of his party and the contents were general in nature. If the author nevertheless fears that the letter may affect the impartiality of the court, he may ask the Constitutional Court to order that the letter should be removed from the court file on the ground of interference by a public authority with the exercise of his right to a fair hearing.

4.6 The State party submits that difference in treatment between the Restitution Law No. 243/1992 and the laws applying to the post-1948 confiscations does not constitute discrimination, as the two sets of laws serve different purposes and cannot be compared.

4.7 The State party concluded that the author has failed to exhaust domestic remedies and that the communication is thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. The State party also submits that since the author's allegations are not substantiated and/or do not disclose an appearance of a violation of any of the rights set forth in the Covenant, the communication is inadmissible ratione materiae.

The author's comments

5.1 In his comments, the author refers to his original communication and submits that the State party has basically failed to contradict any of his claims.

5.2 He emphasizes that he retained his Czech citizenship under Benes Decree No. 33/1945, and that thus all the requirements of the original Law 243/1992 had been fulfilled when the Land Office approved the return of his property. The author notes that the State party remains silent about amendment 30/1996, introducing a further condition of continuous Czech citizenship, which did not apply when his restitution contract was approved in 1993. According to the author, this amendment made it possible to expropriate him again.

5.3 According to the author, the application of further domestic remedies would be futile because of the political interests in his case. He moreover points to the delays in the handling of the case, whether intentional or not.

5.4 The author dismisses the State party's attempt to explain away the Minister's letter as a simple expression of opinion and maintains that the opinion of the Prime Minister was equated with an interpretation of the law, and submits that the political dimension of his restitution procedure is evident from the interaction of several components.

5.5 With regard to the petition received by the Ministry of Agriculture from local residents, the author points out that the decision of the Semily Land Office was handed down on 10 March 1993 and the petition against it was submitted on 7 August 1995, two years and five months later. The Minister of Agriculture's order quashing the Semily Land Office's earlier decision followed on 23 November 1995, three and half months after the petition. It becomes evident that the 30-day time limit stipulated in Law 85/1990 concerning the right of petition was not observed.

5.6 In a further submission, the author states that his complaint against the Minister's decision of 23 November 1995 was rejected by the High Court on 25 August 1997. The author claims that the reasons given by the court again illustrate the political nature of the process.

5.7 On 25 March 1998, the Prague City Court rejected the author's appeal against the refusal of the restitution of his property by the Land Office in 1996, since he no longer fulfilled the requirements added to the law in amendment 30/1996. On 24 July 1998, the author filed a complaint against this decision with the Czech Constitutional Court.

5.8 The author further submits that even if the Constitutional Court would find in his favour, the decision would again be referred to the first instance (the Land Office), thus entailing considerable further delay and opening the door for more political intervention. According to the author, the whole procedure could easily take another five years. He considers this to be unjustifiably long, also in view of his age.

5.9 In this context, the author recalls the salient aspects of his case. The restitution contract which he concluded was approved by the Land Office on 10 March 1993, and the appeal against the approval was rejected by the Central Land Office on 30 July 1993, after which the restitution was effected in accordance with Law 243/1992. Only on 25 November 1995, that is more than two years after he had taken possession of his lands, did the Minister of Agriculture quash the Land Office's decision, on the ground that the Office had not sufficiently verified whether the author complied with the requirement of permanent residence. It appears from the Court judgements in the case, that at the time of the Minister's decision, it was expected that the Constitutional Court would declare this residence requirement unconstitutional (it subsequently did so, on 12 December 1995, less than a month after the Minister's decision). After a requirement of continued citizenship was added to Law 243/1992 by law 30/1996 of 9 February 1996, the Land Office then reviewed the legality of the restitution agreement in the author's case, and applying the new law declared the agreement invalid on 3 March 1996. The two court proceedings which the author then initiated, were delayed, as acknowledged by the State party, in one case because the Ministry was not in a position to furnish the papers needed by the Court, and in the other because of a backlog at the court in handling cases.

Admissibility considerations

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 During its sixty-fifth session in March 1999, the Committee considered the admissibility of the communication. It noted the State party's objection to the admissibility of the communication on the ground that the author had failed to exhaust all domestic remedies available to him. The Committee noted, however, that in August 1997, the High Court rejected the author's complaint against the Minister's decision, and on 25 March 1998, the City Court in Prague rejected his appeal against the Land Office's decision of 1996. The text of these decisions shows that no further appeal is possible. The effect is to preclude any further attempt by the author to validate and seek approval of the restitution agreement of 1992.

6.3 The author has since filed a constitutional complaint against the Prague City Court decision that the requirement of continued citizenship is legitimate. The Committee noted that in the instant case, the Constitutional Court had already examined the constitutionality of Law 243/1992. In the opinion of the Committee and having regard to the history of this case, a constitutional motion in the author's case would not offer him a reasonable chance of obtaining effective redress and therefore would not constitute an effective remedy which the author would have to exhaust for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.4 In this context, the Committee also took note of the author's arguments that even if he were to win a constitutional appeal, the case would then be referred back, and the proceedings could take another five years to become finalized. In the circumstances, taking into account the delays which had already been incurred in the proceedings and which were attributable to the State party, the delays which would likely occur in future and the author's advanced age, the Committee also found that the application of domestic remedies had been unreasonably prolonged.

7. On 19 March 1999, the Committee held that the communication was admissible insofar as it might raise issues under articles 14, paragraph 1, and 26 of the Covenant.

Consideration of the merits

8.1 Pursuant to article 5, paragraph 1, of the Optional Protocol, the Committee proceeds to an examination of the merits, in the light of the information submitted by the parties. It notes that it has received sufficient information from the late author and his surviving spouse, and that no further information on the merits has been received from the State party subsequent to the transmittal of the Committee's admissibility decision, notwithstanding two reminders. The Committee recalls that a State party has an obligation under article 4, paragraph 2, of the Optional Protocol to cooperate with the Committee and to submit written explanations or statements clarifying the matter and the remedy, if any, that may have been granted.

8.2 The Committee has noted the author's claims that the State party has violated article 14, paragraph 1, of the Covenant because of alleged interference by the executive and legislative branches of government in the judicial process, in particular through the letter of the Prime Minister dated 29 April 1993, and because of the adoption of retroactive legislation aimed at depriving the author of rights already acquired by virtue of prior Czech legislation and decisions of the Semily Land Office. With regard to the adoption of retroactive legislation, the Committee observes that, whereas an allegation of arbitrariness and a consequent violation of article 26 is made in this respect, it is not clear how the enactment of law 30/1996 raises an issue under article 14, paragraph 1. As to the Prime Minister's letter, the Committee notes that it was part of the administrative file in respect of the author's property which was produced in Court, and that there is no indication whether and how this letter was actually used in the court proceedings. In the absence of any further information, the Committee takes the view that the mere existence of the letter in the case file is not sufficient to sustain a finding of a violation of article 14, paragraph 1, of the Covenant.

8.3 With regard to the author's allegation of a violation of article 26 of the Covenant, the Committee begins by noting that Law No. 243/1992 already contained a requirement of citizenship as one of the conditions for restitution of property and that the amending Law No. 30/1996 retroactively added a more stringent requirement of continued citizenship. The Committee notes further that the amending Law disqualified the author and any others in this situation, who might otherwise have qualified for restitution. This raises an issue of arbitrariness and, consequently, of a breach of the right to equality before the law, equal protection of the law and non-discrimination under article 26 of the Covenant.

8.4 The Committee recalls its Views in cases No. 516/1993 (Simunek et al.), 586/1994 (Joseph Adam) and 857/1999 (Blazek et al.) that a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary, and, consequently a discriminatory distinction between individuals who are equally victims of prior state confiscations, and constitutes a violation of article 26 of the Covenant. This violation is further exacerbated by the retroactive operation of the impugned Law.

9.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that article 26, in conjunction with article 2 of the Covenant, has been violated by the State party.

9.2 In accordance with article 2, paragraph 3 (a) of the Covenant, the State party is under an obligation to provide the late author's surviving spouse, Dr. Johanna Kammerlander, with an effective remedy, entailing in this case prompt restitution of the property in question or compensation therefor, and, in addition, appropriate compensation in respect of the fact that the author and his surviving spouse have been deprived of the enjoyment of their property since its restitution was revoked in 1995. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law.

9.3 The Committee recalls that the Czech Republic, by becoming a State party to the Optional Protocol, recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. Furthermore, the Committee urges the State party to put in place procedures to deal with Views under the Optional Protocol.

9.4 In this connection, the Committee wishes to receive from the State party, within 90 days following the transmittal of these Views to the State party, information about the measures taken to give effect to these Views. The State party is also requested to publish the Committee's Views.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

1. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the new Czech Republic notified its succession to the Covenant and the Optional Protocol.

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Geneva, Switzerland

WRITTEN OBSERVATIONS OF LIECHTENSTEIN

OBSERVATIONS ÉCRITES DU LIECHTENSTEIN

INTRODUCTION

The Six German Preliminary Objections

1. These Written Observations respond to Germany's Preliminary Objections of 27 June 2002. They are filed in conformity with the President's Order of 12 July 2002.

2. In an attempt to prevent the Court from considering the merits of the dispute, Germany presents six rather disparate Preliminary Objections to the claims presented by Liechtenstein. These objections are:

> first, that there is no dispute between the parties;[1]
>
> secondly, that any dispute arose prior to 18 February 1980 and is accordingly excluded from the Court's jurisdiction by Article 27 (b) of the European Convention for the Peaceful Settlement of Disputes;[2]
>
> thirdly, that (if there is a dispute) it relates to a matter within Germany's domestic jurisdiction;[3]
>
> fourthly, that Liechtenstein's claims are not adequately substantiated and are inadmissible for that reason;[4]
>
> fifthly, that the dispute really concerns the Czech Republic alone, and that Germany is protected by the *Monetary Gold* principle from being sued for decisions of its own courts and other organs;[5]

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[1] *Preliminary Objections of the Federal Republic of Germany* (hereafter GPO), Vol. I, paras. 34-63.

[2] GPO, paras. 64-105.

[3] GPO, paras. 106-114.

[4] GPO, paras. 115-150.

[5] GPO, paras. 151-180.

sixthly, that Liechtenstein's claim is inadmissible because there has been a failure to exhaust local remedies, and this notwithstanding the decision of the highest German court, which Germany itself presents as authoritative.[6]

3. In these Written Observations, the six German Preliminary Objections will be addressed in turn, in the order set out above. Part I deals with the existence of a dispute (Preliminary Objection 1). Part II deals with issues of jurisdiction under the European Convention (Preliminary Objections 2 and 3). Part III deals with issues of admissibility (Preliminary Objections 4 - 6). There follow Liechtenstein's submissions.

4. It may be noted that Germany's Preliminary Objections do not cover the whole field of Liechtenstein's claim as presented in its Application and developed in its Memorial. For example, Germany fails to deal directly with the argument that it was lawful vis-à-vis Liechtenstein to treat the Liechtenstein property as falling within the scope of the Settlement Convention on condition of payment of compensation for that property. Likewise the argument that local remedies have not been exhausted clearly can have no application to Liechtenstein's claim affecting the property of the Prince of Liechtenstein personally; it is plain that he has exhausted all local remedies available in Germany. Since, for the reasons to be given below, each and every one of the German Preliminary Objections should be rejected outright, no question arises as to the possible severance of any aspect of Liechtenstein's claims.

5. Before turning to the Preliminary Objections, four remarks of a general character are called for.

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[6] GPO, paras. 181-208.

Germany previously accepted that there was a dispute between the parties under international law

6. In the first place, the Preliminary Objections now presented by Germany stand in marked contrast to its own earlier attitudes towards this dispute, as revealed in the two rounds of consultations between German and Liechtenstein delegations and in certain other public statements of German officials. For example, during the consultations between the two States on 14 June 1999, it was recognized by the head of the German delegation as stated in an internal report of Liechtenstein:

> *"Deutschland könne auch nicht einräumen, daß es völkerrechtliche Ansprüche bzw. Völkerrecht verletzt habe. Es sei damit ein Gegensatz an Rechtsauffassungen entstanden und dieser Meinungsgegensatz bestehe auch nach dieser Konsultationsrunde fort. Eine Auflösung könne nur auf höherer Ebene erfolgen. Es bestehe die Möglichkeit des Austauschs von Aide-Mémoires vor einer möglichen nächsten Runde oder aber eine gerichtliche Regelung ohne weitere Schritte."* [7]
>
> Translation:
> "Neither could Germany concede that it had violated international law or claims under international law. As a result, contrary legal opinions had been created and this divergence of opinion would continue to exist even after this round of consultations. A solution could only be found at a higher level. There was the possibility of an exchange of Aide-Mémoires prior to a possible further round or otherwise a settlement by judicial decision without any further steps."

It is precisely such a settlement by judicial decision that Germany now seeks by any and all means to avoid.

Germany misapprehends the dispute before the Court, seeking to convert it into a different dispute involving different States

7. In the second place, Germany seeks to hide behind the Czech Republic, consistently misrepresenting the dispute Liechtenstein has brought to the Court and confusing it

with a separate dispute between Liechtenstein and the Czech Republic. In short, it rewrites Liechtenstein's Application with a view to formulating preliminary objections against the rewritten version. But the Court has to treat the claim actually brought by Liechtenstein against Germany, not the (different) claim Germany would have the Court believe has been brought.

8. It is fair to state at once - and Liechtenstein has never made any secret of it - that there is a dispute between Liechtenstein and the Czech Republic concerning the application of, in particular, Beneš Decree No. 12 to the Liechtenstein property. That unresolved situation is part of the factual background to the present dispute.[8] If the Czech Republic had not seized the Liechtenstein property in 1945, the present dispute would never have arisen. But the disputes are nonetheless completely different; they arose between different parties at different times and they concern different factual and legal issues. Germany seeks to confuse the two at every step, asserting (contrary to the clear terms of the Application and the documentary record) that Liechtenstein's "real" case is against the Czech Republic.[9]

9. The present Application is not based on a mistake of identity. Liechtenstein may have a dispute with Germany and at the same time a distinct dispute with the Czech Republic, each of them founded on its own factual and legal grounds. And that is, indeed, the case. Germany fails to confront Liechtenstein's *actual* case against it, and thereby commits the sin of "inventiveness" of which it several times accuses Liechtenstein.[10] More importantly, it thereby fails to bring its Preliminary Objections into any actual relation with the case that is before the Court.

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[7] Annex 48, para. 20.

[8] Germany infers that the legal issues raised as a result of the Beneš Decrees are dead issues, of purely historical significance. This is of course not the case: on the contrary, they remain matters of active public and international controversy, including in Germany itself.

[9] GPO, paras. 59-60.

[10] E.g., GPO, para. 8 ("an artificial construct purposefully invented").

10. That case is, in summary, as follows.[11] Both Liechtenstein and Germany before 1990 treated the questions arising from the Beneš Decrees, and in particular Beneš Decree No. 12, as open questions. In particular the regime of the Settlement Convention was not applied by Germany to the neutral Liechtenstein property; there was at no stage any suggestion by Germany that the Liechtenstein property constituted "German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war" within the meaning of Article 3 of Chapter Six of the Settlement Convention. Had the regime of the Settlement Convention been applied to the Liechtenstein property, Germany would have been called upon under Article 5 of the Convention to compensate Liechtenstein nationals for doing so.

11. In 1990, at Germany's suggestion, in its negotiations with the United States, the United Kingdom and France, the compensation obligation in Article 5 was terminated, on the basis that no new categories of property existed which could be brought within the scope of the regime. At the same time the Settlement Convention regime, previously envisaged only as a temporary measure pending a final peace treaty, was made permanent. Then, by a decision in 1995 finally endorsed by its highest court in 1998, Germany decided that the Liechtenstein property was subject to the regime of the Settlement Convention, i.e., that it was after all to be treated as "German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war", and this despite the acknowledged facts that Liechtenstein was neutral in World War II, that Liechtenstein property was not included in the category of "German external assets", and that such property was not "seized for the purpose of reparation or restitution, or as a result of the state of war". Liechtenstein immediately protested against these decisions and was met with the reply by Germany that they were binding, were correct or at least reasonable, and were of general application, not being limited to the single painting that was at issue in the German courts. This was the first time that Germany had taken such a position vis-à-vis the Liechtenstein property.

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[11] See the Application and Memorial for further detail.

12. Germany thus took the position that it was entitled vis-à-vis Liechtenstein (which, of course, as a neutral was never party to the Settlement Convention) to treat its property as German and as covered by the regime of the Convention, while at the same time denying any obligation to compensate Liechtenstein for the loss of that property. In consequence Liechtenstein not merely lost any claim to individual assets located in Germany (including the Pieter van Laer painting), but is now faced with the prospect that any persons within German jurisdiction will be able, for the first time, without any fear of claims by Liechtenstein owners, to acquire and deal with items of the Liechtenstein property - all this to the evident detriment of Liechtenstein and its nationals.

13. It will immediately be seen that the dispute outlined in the previous paragraph has the following characteristics:

(i) it arose between Liechtenstein and Germany and involved a difference of opinion on legal and factual issues between the two States;

(ii) it involves the question whether Germany is entitled to apply provisions of the Settlement Convention, an international treaty, to a neutral, non-party State and to its nationals;

(iii) it arose after 1990 (and thus after 1980);

(iv) it is amply substantiated in Liechtenstein's Application and Memorial, and in the documents annexed thereto;

(v) it does not involve as a precondition the resolution of any legal claim against a third State, or any judicial finding as to any such claim; and

(vi) it does involve a final decision of the highest German courts on the very question in issue, a decision which Germany admits is irreversible and of general application.

14. As will be demonstrated in more detail in later Chapters, it follows from these six characteristics of the situation that each of the six German Preliminary Objections is untenable and must be rejected.

Germany denies that it has changed its position with respect to the Liechtenstein property

15. The third preliminary point is as follows. Again and again, Germany seeks to defend itself against Liechtenstein's claim by arguing that it had always taken the position espoused by the German courts in the 1990s.[12] Germany (by this account) had been perfectly consistent as to the scope of the Settlement Convention throughout. There was accordingly no change of position. If there is now a dispute, it is a dispute which arose from a legal situation pre-dating 1980, thus falling outside the temporal scope of the European Convention for the Peaceful Settlement of Disputes. Moreover the substantive Liechtenstein claim based on the change of position is without foundation; there was no such change.

16. This *leitmotif* of the German Preliminary Objections calls for a number of comments.

(a) It is based upon a German reading of German case-law. But the assertions Germany now makes were never at any stage articulated before 1990. The shared assumption was that the Settlement Convention applied to German external assets, i.e., to assets having some proper (albeit possibly indirect) relation to Germany itself, and not to neutral third States. It cannot seriously be suggested that Liechtenstein, or any other State, would have sat by, content to see its property classified as "German external assets", especially when such a classification carried with it significant adverse legal consequences. Yet Germany now suggests that Liechtenstein accepted this situation for many years. There is not the slightest evidence that it did so. Indeed, the evidence suggests the contrary, both so far as Liechtenstein *and* Germany were concerned.

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[12] E.g., GPO, paras. 7, 8, 32, 56.

(b) Even if, for the sake of argument, it be accepted that earlier decisions of the German courts carried the potential that Liechtenstein property would in future be subjected to the regime of the Settlement Convention, that was a mere potentiality. None of the earlier cases concerned Liechtenstein property. It is not incumbent upon third States to dissect the internal case-law of other States in matters not concerning them directly, in order to discern some threat of future detriment. The dispute between Liechtenstein and Germany arose in fact in the 1990s as a result of actual decisions in that decade by the German courts. Even if academic observers could have seen in the earlier decisions the potential for this to happen (and could have agreed on this), the fact is that it did not happen until after 1990.[13] International disputes arise when they arise, not because they might be predicted as possible or even likely from some vantage point of perfect foresight.

(c) In any case, the position taken by the German courts in the 1990s was not contained in the earlier case-law. It is a new development. The position is dealt with in some further detail in an Appendix to these Written Observations, to which the Court is respectfully referred.[14] The following points as to the German case-law emerge. None of the previous cases concerned Liechtenstein or other neutral property. None concerned Beneš Decree

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[13] In fact, however, German scholars at no stage suggested or anticipated that the Liechtenstein property fell within the scope of the inadmissibility rule in the Settlement Convention. The position in the German literature is briefly analyzed in the Appendix I, paras. A12-A18.

[14] See the Appendix I, paras. A2-A11.

No. 12, under which all or most of the Liechtenstein property was seized. In only two of them was the "no objections" rule of Article 3 of Chapter Six of the Settlement Convention applied. One of these cases concerned assets already identified by a United States' court as "enemy-associated" assets.[15] The other concerned German-owned shares in a Dutch company which were seized under the Dutch enemy property law.[16] Taken as a whole the pre-1990 cases support the conclusion (which German legal thought at the time also supported[17]) that the German courts retained *Kompetenz-Kompetenz* in terms of the scope of application of the Settlement Convention. The analysis of all the cases (in its Preliminary Objections Germany ignored several of them) does not support Germany's theory of juridical stasis *in any event*.

(d) Finally, even if, for the sake of argument, it is accepted that there was no *change* of position by Germany, but simply an as-yet-unrealized potentiality, the fact remains that the position taken in the 1990s had never actually been taken before. What its international legal consequences are in terms of the relations between Liechtenstein and Germany is evidently a matter for the merits.

Germany tries to convert issues concerning the merits into issues of jurisdiction or admissibility

17. This leads to the fourth preliminary point. It is evident from a reading of the Preliminary Objections that Germany attempts to introduce considerations essentially related to the merits into the case at this stage. Seeking to avoid an open consideration of the merits of the claim after a full and orderly preliminary objection process, it calls on the Court to inject an (evidently partial) consideration of merits issues into this phase. Indeed at one point Germany accordingly openly calls on the Court to develop

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[15] See GPO, Annex 3.

[16] See GPO, Annex 2.

beyond the existing law of admissibility in order to encompass its position.[18] In Liechtenstein's view, there is no need or justification for such a development. It is true that the Court retains the power to join preliminary issues to the merits, where this is necessary.[19] But it has exercised that power sparingly. The converse power (allowing merits arguments to obtrude into and affect the preliminary objections phase) does not exist,[20] and for good reason. Germany's arguments would tend to produce the result that the preliminary objections phase was a "dress rehearsal" for the merits, producing difficulties for the Court and inequality between the parties. In such circumstances, the Defendant State would be free to change its position on the merits in line with the Court's decision on the "preliminary" objections, while the Applicant would have no such freedom. The time for merits arguments is when the phase of the merits has been reached.

18. For these reasons, Liechtenstein respectfully suggests that the confusion attempted by Germany as between genuinely preliminary issues and the merits of the present dispute ought not to be entertained. A clear understanding of the dispute presented by Liechtenstein reveals, clearly, that the Court has jurisdiction and that Liechtenstein's claim is admissible. That being so, remaining issues of proof and of legal analysis on questions of substance can and should be left to the merits phase.

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[17] See the Appendix I, paras. A11-A17.

[18] GPO, para. 43.

[19] Compare Article 79 (7) of the Rules.

[20] On the contrary, on the presentation of preliminary objections, consideration of the merits is suspended, see Article 79 (5) of the Rules.

PART ONE

THE DISPUTE BETWEEN LIECHTENSTEIN AND GERMANY

CHAPTER 1

GERMANY'S ARGUMENT THAT THERE IS NO DISPUTE

A. Introduction

1.1 In its First Preliminary Objection, Germany alleges that no dispute exists between Liechtenstein and Germany.[21] Germany does not support this allegation but, in essence, uses this objection to accuse Liechtenstein of having invented a dispute.[22] Indeed, Germany itself proceeds to illustrate the existence of a dispute by setting out its disagreement with Liechtenstein's positions in detail. Therefore, Germany's First Preliminary Ojection must fail.

1.2 Liechtenstein cannot agree with Germany that the Court must "further develop and specify the concept of 'dispute'", in order to enable it to decline "artificially constructed cases".[23] The jurisprudence is clear that it is for the Court - and only the Court - to decide on an objective basis whether a dispute exists. If the Court should be confronted with a case that it does not regard as a "real dispute", the existing legal principles already allow and require the Court to declare such a case inadmissible. However, the present case is not such a case.

1.3 The Court has established clear criteria defining whether a dispute exists between two states under international law. In numerous judgments, the Court has referred to the definition of dispute as a

> "disagreement on point of law or fact, a conflict of legal views or interests between parties".[24]

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[21] GPO, paras. 35-63.

[22] GPO, paras. 37, 50 and 51.

[23] GPO, paras. 42-43.

[24] *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924 PCIJ, Ser. A, No. 2, p. 11; *Northern Cameroons*, *I.C.J. Reports* 1963, p. 27; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, *I.C.J. Reports* 1988, p. 27, para. 35; *East Timor (Portugal v. Australia)*, 30 June 1995, *I.C.J. Reports* 1995, pp. 99-100, para. 22; *Land and Maritime Boundary between Cameroon and Nigeria*, Jurisdiction and Admissibility, *I.C.J. Reports* 1998, pp. 314-315, para. 87.

Accordingly, in order to establish the existence of a dispute,

> "it must be shown that the claim of one party is positively opposed to the other".[25]

It is, in addition, not for one of the Parties to decide whether there is a dispute or not. As the Court has stated:

> "whether there exists an international dispute is a matter for objective determination".[26]

1.4 The established criteria are fulfilled in the case at hand. The submissions to date reflect, quite starkly, that Liechtenstein and Germany have different legal opinions on many issues, including whether Germany's conduct in subjecting neutral Liechtenstein property to the scope of the reparations regime of the Settlement Convention without compensating Liechtenstein was lawful under international law (B). This dispute is squarely between Liechtenstein and Germany (C).

B. Liechtenstein's claims are opposed by Germany

1.5 As set out in the Memorial, following the decisions of German courts from 1995 to 1998, Liechtenstein has - on numerous occasions - presented its legal position regarding Germany's wrongful conduct to the German Government. The German Government on every occasion has opposed Liechtenstein's view. Quite surprisingly, and without explaining how and why the dispute that undoubtedly existed has vanished, Germany now asserts that there is no dispute since there are no claims positively opposed to each other.

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[25] *South West Africa*, Preliminary Objections, *I.C.J. Reports* 1962, p. 328.

[26] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, *I.C.J. Reports* 1950, p. 74.

1.6 It is hard to imagine a more striking opposition of views. At the second consultation held on 14 June 1999 in Vaduz the head of the German delegation, Dr Hilger, declared according to an internal report of Liechtenstein:

> *"Deutschland könne nicht einräumen, daß es völkerrechtliche Ansprüche bzw. Völkerrecht verletzt habe. Es sei damit ein Gegensatz an Rechtsauffassungen entstanden und dieser Meinungsgegensatz bestehe auch nach dieser Konsultationsrunde fort. Eine Auflösung könne nur auf höherer Ebene erfolgen. Es bestehe die Möglichkeit des Austauschs von Aide-Mémoires vor einer möglichen nächsten Runde oder aber eine gerichtliche Regelung ohne weitere Schritte."* [27]
>
> Translation:
> "Neither could Germany could not concede that it had violated international law or claims under international law. As a result, contrary legal opinions had been created and this divergence of opinion would continue to exist even after this round of consultations. A solution could only be found at a higher level. There was the possibility of an exchange of Aide-Mémoires prior to a possible further round or otherwise a settlement by judicial decision without any further steps."

Moreover, the German Foreign Minister's letter dated 20 January 2000, referring to the aide-mémoire of Liechtenstein of 9 December 1999 (Annex 44 of the Memorial) contains the wording:

> *"Die Bundesregierung teilt die darin vertretene Rechtsauffassung bekanntlich nicht."*[28]
>
> Translation:
> "It is known that the Government does not share the legal opinion expressed therein."

It is therefore simply wrong for Germany to maintain that Germany agrees with Liechtenstein's opinion arising from the decisions of German courts from 1995 to 1998.[29]

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[27] Annex 48, para. 20.

[28] Memorial, Annex 45, p. A 505.

[29] GPO, para. 55.

1.7 The Parties also have opposing views as regards the lawfulness of Germany's conduct under international law. Liechtenstein asserts that a change took place when Germany included Liechtenstein property in the scope of the Settlement Convention, thereby applying a reparations regime to neutral property without compensation, and thus failing to respect Liechtenstein's sovereignty and neutrality as well as the rights of Liechtenstein and its nationals. Germany denies that a change of position ever occurred and therefore is of the opinion that its conduct is, and always has been, lawful. This opposition of views clearly evidences a dispute.

1.8 Liechtenstein argues that Germany and its courts interpreted the Settlement Convention in a way that is not required under the Convention itself or by the exchange of notes with the three Western Allies, and in a way that violates international law. On the contrary, Germany contends that it was required, by the Settlement Convention and the Exchange of Notes, to interpret the Convention to include the property of Liechtenstein, a neutral state, in the post-war reparations regime.

1.9 Furthermore, the arguments brought forward by Germany to support its First Preliminary Objection[30] go to the merits and not the admissibility of the case, thereby having the effect of underscoring the existence of a dispute on the merits. Germany declares that there might be a possible disagreement concerning the interpretation of the exclusion of jurisdiction of German courts over property "seized for the purpose of reparation or restitution, or as a result of the state of war by a third country".[31] However, Germany is of the opinion that it is legally obliged to conform to the provision of a treaty, the Settlement Convention, validly concluded with other States. But - and this is the core issue - Liechtenstein questions whether it was lawful for Germany to apply the Settlement Convention to Liechtenstein property and - if Germany was entitled to do so - argues that Germany then failed to compensate Liechtenstein for the losses incurred. It is apparent that the Parties have opposing views on these issues on the merits.

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[30] GPO, paras. 56-58.

[31] GPO, para 58.

C. The parties to the present dispute are Liechtenstein and Germany

1.10 Similarly misconceived is Germany's "admissibility" argument that Liechtenstein should demand compensation exclusively from the Czech Republic, but not from Germany, and that therefore there is no dispute between Germany and Liechtenstein.[32] Whether or not Liechtenstein may demand compensation from Germany is a question that belongs exclusively to the merits. When Germany states, without giving reasons, that "even if all statements on the facts made by Liechtenstein were held to be correct, they still would not justify a claim to compensation by Germany",[33] Germany objects to applying the compensation provisions in the Settlement Convention as well as the law of State responsibility. Germany itself is articulating a dispute that the Court has to decide on the merits.

1.11 Germany further asserts that somehow there is no dispute between Germany and Liechtenstein because there is (also) a dispute between Liechtenstein and former Czechoslovakia, which initiated the confiscations.[34]

1.12 Here, it is Germany that artificially tries to put another dispute before the Court. As noted already, there is a dispute between Liechtenstein and the Czech Republic. But the existence of such a dispute does not negate the existence of the separate dispute between Liechtenstein and Germany, which is based on Germany's unlawful conduct vis-à-vis Liechtenstein.

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[32] GPO, para. 62.

[33] GPO, para. 60.

[34] GPO, para. 59-60.

D. Conclusion

1.13 In sum, by objective standards, a dispute exists between the Parties as to the lawfulness and legal consequences of Germany's conduct. There is, in particular, disagreement between the Parties as to whether Germany changed its position in the 1990s vis-à-vis Liechtenstein property when including it in the scope of the Settlement Convention, thus applying the reparations regime to neutral property. There is disagreement between the Parties as to whether Germany must compensate Liechtenstein. There is also disagreement between the Parties as to whether Germany failed to respect Liechtenstein's sovereignty and neutrality as well as the rights of Liechtenstein and its nationals. Hence, Germany's First Preliminary Objection must fail.

PART TWO

THE COURT'S JURISDICTION OVER THE DISPUTE UNDER THE EUROPEAN CONVENTION FOR THE PEACEFUL SETTLEMENT OF DISPUTES

CHAPTER 2

GERMANY'S ARGUMENT THAT ITS TREATMENT OF THE LIECHTENSTEIN PROPERTY IS WITHIN ITS DOMESTIC JURISDICTION

A. Introduction

2.1 In its Preliminary Objections, Germany argues that the dispute between the parties concerns a matter within Germany's domestic jurisdiction, which is correspondingly excluded from the Court's jurisdiction by Article 27 (b) of the European Convention for the Peaceful Settlement of Disputes (the European Convention).[35] This provides as follows:

> "The provisions of this Convention shall not apply to:
>
> ...
>
> (b) disputes concerning questions which by international law are solely within the domestic jurisdiction of States."

2.2 The three pages of Germany's Preliminary Objections[36] devoted to this issue are cursory in character. Not a single case of the Court dealing with the issue of domestic jurisdiction is cited; not a single authority is relied on.[37] Nor is there any detailed analysis of Article 27 (b) itself. Germany's pleading on this point is a summary attempt to avoid the Court dealing with the merits. As a preliminary plea it should - it is respectfully submitted - be summarily dismissed.

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[35] Strasbourg, 29 April 1957, 464 *United Nations Treaty Series*, p. 243.

[36] GPO, paras. 106-114.

[37] The literature on domestic jurisdiction is of course extensive. See, e.g., C.B.H. Fincham, *Domestic Jurisdiction: the Exception of Domestic Jurisdiction as a Bar to Action by the League of Nations and the United Nations*, A.W. Sijthoff, Leiden, 1948; H. Waldock, "The Plea of Domestic Jurisdiction before International Legal Tribunals", *31 British Yearbook of International Law*, 1954, p. 96; M.S. Rajan, *United Nations and Domestic Jurisdiction*, 2nd ed., Asia Publishing House, London, 1961; R. Higgins, *The Development of International Law through the Political Organs of the United Nations*, Oxford University Press, London, 1963; D. Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs*, Martinus Nijhoff, The Hague, 1975, pp. 37-45; A.A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations", *25 International and Comparative Law Quarterly*, 1976, p. 715; A.A. Cançado Trindade, "Domestic Jurisdiction and Exhaustion of Local Remedies: A Comparative Analysis", *16 Indian Journal of International Law*, 1976, p. 187; G.J. Jones, *The United Nations and the Domestic Jurisdiction of States: Interpretations and Applications of the Non-Intervention Principle*, University of Wales Press, Cardiff, 1979; G. Arangio-Ruiz, "The Plea of Domestic Jurisdiction Before the International Court of Justice: Substance or Procedure?" in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice*, Cambridge University Press, Cambridge, 1996, p. 440; S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, 3rd ed., Nijhoff, The Hague, 1997, pp. 774-778.

B. The interpretation of Article 27 (b) European Convention

2.3 The concept of domestic jurisdiction goes back at least to the Covenant of the League of Nations, and is of course reflected in the United Nations Charter, Article 2 (7). It has been dealt with on numerous occasions by the Court and its predecessor, so that questions of its interpretation are well enough known. This makes Germany's failure to refer to any of the authorities in point the more noteworthy.

2.4 Under Article 27 (b) of the European Convention, the obligations of peaceful settlement of disputes entailed by the Convention do not apply in certain limited cases. Article 27 (b) is thus an exception to a general provision intended to provide for the peaceful settlement of international disputes, and it should not be given an extensive interpretation. In any event its terms are clear and precise: it is only those disputes which "by international law" fall "solely" within the domestic jurisdiction of States that are excluded from the obligation of peaceful settlement.

"by international law"

2.5 The phrase "by international law" excludes any form of independent judgement on the part of the Defendant State, such as is implied in the so-called "automatic reservation" to the Statute of the Court. It picks up the Permanent Court's insistence, in the *Tunis and Morocco Nationality Decrees* opinion,[38] on international law as the criterion for what falls and what does not fall within the domestic jurisdiction of any State. Thus it is irrelevant that the object of a complaint is a law of the Respondent State or a decision of one of its courts; what may be domestic in origin may nonetheless concern a matter not within the domestic jurisdiction of that State. All this was well understood at the time of the conclusion of the European Convention.

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[38] *Tunis and Morocco Nationality Decrees*, 1923 PCIJ, Ser. B, No. 4.

"solely"

2.6 Secondly, under Article 27 (b) it is necessary that the dispute fall "solely" within the domestic jurisdiction of the State invoking that exception. The negotiators of the European Convention would have needed no reminding of the significance of the term "solely" in this context. It was taken from Article 39 of the General Act for the Pacific Settlement of Disputes,[39] which in turn reflected Article 15 (8) of the Covenant of the League of Nations. Under these provisions, it was only when a matter was found to be solely within the domestic jurisdiction of a State that the Council was to abstain from making any recommendation for peaceful settlement. Thus a matter had not only to fall in principle within the reserved domain of domestic jurisdiction, it also had to do so "solely", i.e. exclusively or entirely. This contrasts with Article 2 (7) of the United Nations Charter, which uses the more flexible term "essentially". Faced with the choice between the terms "solely" and "essentially" - a choice which had been debated at the San Francisco Conference - the drafters of the European Convention opted for the more restrictive term.[40]

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[39] Geneva, 26 September 1928, 93 *League of Nations Treaty Series*, p. 343.

[40] See "*Final Report of the Committee of Experts on the Peaceful Settlement of Disputes and the Creation of a European Court of Justice*", in Council of Europe, Committee of Ministers, 13th Session, Strasbourg, 22 May 1953, CM (53) 58, p. 14 ("The Committee recognised that each of these texts had advantages and disadvantages and finally decided to adopt the formula of the General Act, which has therefore been used as the basis of its draft."). For discussions of the significance of the term "essentially" instead of "solely" see H. Lauterpacht, "The International Protection of Human Rights", *Recueil des Cours*, 1947-I, Vol. 70, pp. 5 *et seq.*, pp. 23-30; C.B.H. Fincham, *Domestic Jurisdiction: the Exception of Domestic Jurisdiction as a Bar to Action by the League of Nations and the United Nations*, A.W. Sijthoff, Leiden, 1948, esp. pp. 100-102; L. Preuss, "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction", *Recueil des Cours*, 1949-I, Vol. 74, pp. 553 *et seq.*, pp. 597-604; M.S. Rajan, *United Nations and Domestic Jurisdiction*,2nd ed., Asia Publishing House, London, 1961, pp. 78-83; B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Oxford University Press, New York, 1994, p. 142; H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, Lawbook Exchange, New Jersey, 2000, pp. 776-779.

C. The Court's approach to issues of domestic jurisdiction under international law

2.7 The Court's predecessor first addressed the issue of domestic jurisdiction in its Advisory Opinion No. 4, *Tunis and Morocco Nationality Decrees*.[41] The question there was whether Article 15 (8) of the League Covenant prevented the League Council dealing with a dispute concerning the conferral of Tunisian or Moroccan nationality on persons born respectively in Tunis or Morocco and having at least one parent born there. The Court held that this did not involve a matter solely within France's domestic jurisdiction under international law. In particular, the Court noted that

- Although paragraph 8 was intended to protect "the internal affairs of a country", it was in the nature of an exception and did "not therefore lend itself to an extensive interpretation".[42]

- The issue of domestic jurisdiction was a preliminary question. That is to say, "when once it appears that the legal grounds (*titres*) relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, and that the question whether it is competent for one State to take certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these legal grounds (*titres*), the provisions contained in Article 15 (8) cease to apply and the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law".[43]

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[41] *Tunis and Morocco Nationality Decrees*, 1923 PCIJ, Ser. B, No. 4.

[42] *Ibid.*, p. 25.

[43] *Ibid.*, p. 26.

- In that case, the parties relied on various international law instruments (e.g., the protectorate agreements concerning Tunis and Morocco),[44] on arguments drawn from international law (e.g., the *rebus sic stantibus* doctrine)[45] and on the practice of the parties (e.g., the alleged renunciation of rights by Great Britain or its alleged recognition of France's exclusive competence to legislate on matters of the nationality of Tunis).[46] Together and separately, these arguments and instruments justified the provisional conclusion "that the dispute [arose] out of a matter which, by international law, [was] not solely within the domestic jurisdiction of France".[47]

2.8 Three points may be drawn from the Permanent Court's careful and authoritative handling of the matter.

2.9 First, it is significant that *Tunis and Morocco Nationality Decrees* concerned an issue - the conferral of nationality - which has always been considered in the first place and in principle as a matter for each individual State, and thus in principle as falling within the reserved domain.[48] Yet even with respect to such a matter, the Court was at pains to stress that the invocation of a legal title and its denial by the other party was sufficient to take the matter outside the reserved domain, provided only that the Court could *provisionally* conclude that the title relied on was "of juridical importance for the dispute".[49]

2.10 Secondly, the primary effect of the challenged legislation in *Tunis and Morocco Nationality Decrees* was a matter which was internal to the territories in question and operated as a matter of their domestic law. Again, these considerations were not sufficient to trigger Article 15 (8). France's right to act in the matter was challenged by Great Britain, and the challenge involved arguments which the Court held, provisionally, were "of juridical importance". That determination in no way prejudged the merits of the dispute, on which the Court carefully refused to express any view whatever.

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[44] *Ibid.*, p. 27.

[45] *Ibid.*, p. 29.

[46] *Ibid.*, pp. 29-31.

[47] *Ibid.*, pp. 31-32.

[48] *Ibid.*, p. 24. See also *Nottebohm* case, *I.C.J. Reports* 1955, pp. 4 *et seq.*, p. 20; Convention on Certain Questions Relating to the Conflict of Nationality Laws, The Hague, 12 April 1930, 179 *League of Nations Treaty Series*, p. 89, Articles 1, 2.

[49] *Tunis and Morocco Nationality Decrees*, 1923 PCIJ, Ser. B, No. 4, p. 26.

2.11 In the third place, the arguments and instruments relied on by the parties included treaties (the protectorate agreements) to which the United Kingdom was not a party. This did not prevent the Court from characterising the resulting situation as one falling within the international domain. France having invoked the protectorate agreements as a basis for its action, the interpretation of those agreements was thus provisionally of juridical importance to the dispute and prevented the matter falling within the scope of France's domestic jurisdiction.

2.12 The approach of the Permanent Court in *Tunis and Morocco Nationality Decrees* represents the approach of the Court to the present day. In fact the Court has never upheld a preliminary objection based on the characterisation of a dispute as falling within the domestic jurisdiction of the Defendant State under international law. It specifically refrained from doing so in the *Norwegian Loans* case, instead upholding Norway's invocation of the automatic reservation contained in France's Optional Clause declaration.[50]

2.13 The approach of the present Court can be seen in the *Right of Passage* case. There India's fifth preliminary objection concerned its reservation for matters "which by international law fall exclusively within the jurisdiction of the Government of India". India argued that there was no "reasonably arguable case" that any right of passage existed across Indian territory, and that therefore the matter fell within its domestic jurisdiction.[51] It also argued that the parties (Portugal on the one side, the Marathas, Great Britain and India as successive territorial sovereigns on the other side) had always dealt with the issue "on the basis that it is a question within the exclusive competence of the territorial sovereign".[52] The Court did not address the question whether the claim was "reasonably arguable"; instead it noted that to interpret the practice of the parties "as signifying that the right of passage is a question which according to international law is exclusively within the domestic jurisdiction of the territorial sovereign" would require it to consider and interpret a substantial body of historical and other material, and that to do so would risk prejudging the merits.[53] It accordingly joined the fifth preliminary objection to the merits.

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[50] *Norwegian Loans* case, *I.C.J. Reports* 1957, pp. 9 *et seq.*, esp. p. 27.

2.14 The Court returned to the issue in its merits judgment in 1960. It began by noting that the mere assertion by India that the rights invoked by Portugal did not exist was not a basis for invoking its domestic jurisdiction. The point was that the Court could only determine that the rights did not exist "after first establishing its competence to examine the validity of these [Portuguese] titles".[54] It went on to reject India's fifth preliminary objection, in the following passage:

> "In the present case Portugal is claiming a right of passage over Indian territory. It asserts the existence of a correlative obligation upon India. It asks for a finding that India has failed to fulfil that obligation. In support of the first two claims it invokes a Treaty of 1779, of which India contests both the existence and the interpretation. Portugal relies upon a practice of which India contests not only the substance, but also the binding character as between the two States which Portugal seeks to attach to it. Portugal further invokes international custom and the principles of international law as it interprets them. To contend that such a right of passage is one which can be relied upon as against India, to claim that such an obligation is binding upon India, to invoke, whether rightly or wrongly, such principles is to place oneself on the plane of international law ... To decide upon the validity of those principles, upon the existence

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[51] *Right of Passage* case, *I.C.J. Reports* 1957, pp. 125 *et seq.*, pp. 149-150.

[52] *Ibid.*, p. 150.

[53] *Ibid.*

[54] *I.C.J. Reports* 1960, pp. 6 *et seq.*, pp. 32-33.

> of such a right of Portugal as against India, upon such obligation of India towards Portugal, and upon the alleged failure to fulfil that obligation, does not fall exclusively within the jurisdiction of India."[55]

It may be noted that the fifth preliminary objection was rejected, despite the fact that in one crucial respect the rights of passage relied on by Portugal were held not to exist.

2.15 The authorities - in particular *Tunis and Morocco Nationality Decrees* and *Rights of Passage* - demonstrate that a matter will not fall solely or exclusively within the domestic jurisdiction of a Defendant State if, in respect of the disputed conduct, it has invoked arguments and instruments of international law, and / or the claimant State has invoked such arguments and instruments against it, with the result that the determination of the dispute may be considered - provisionally and without entering into the merits - to involve consideration of those arguments and instruments. In this respect no better test exists than that formulated by the Permanent Court in 1923: is it provisionally the case that the arguments and instruments relied on by either party may be considered "of juridical importance for the dispute"?

D. The test for domestic jurisdiction under international law applied to the present case

2.16 Applying that test to the circumstances of the present case, the answer is unequivocally yes, and consequently the matter is not solely within the domestic jurisdiction of Germany.

2.17 The present case concerns a dispute which arose when Germany, in and after 1995, asserted for the first time the right to apply the Settlement Convention to the property of Liechtenstein, a neutral in World War II. It arose with respect to property which had been seized by a third State. Such a dispute is transparently not one solely within the domestic jurisdiction of Germany.

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[55] *Ibid.*, p. 33.

2.18 In the present case, Germany invoked the Settlement Convention, an international treaty, as a basis for its treatment of the Liechtenstein property. In and of itself that is sufficient to refute the argument based on domestic jurisdiction. There is a question, of juridical importance, whether the Settlement Convention is properly invoked vis-à-vis neutral property. There is a question, of juridical importance, whether a defeated State in a war is entitled to rely on a treaty such as the Settlement Convention vis-à-vis a non-party to that treaty. There is a question, of juridical importance, whether the Settlement Convention requires or permits Germany to defer to the erroneous classification of property as enemy property by an allied Power responsible for its seizure. There is a question whether, if so, any such provision of the Settlement Convention could be opposable to Liechtenstein. Not one of these questions (and they are only examples) is within the domestic jurisdiction of Germany even in principle - let alone *solely* within its domestic jurisdiction.

2.19 For its part, Liechtenstein claims that Germany was not entitled to treat the Liechtenstein property as coming within the scope of the Settlement Convention. It claims that Germany thereby has failed to respect Liechtenstein's sovereignty and neutrality. In the alternative it claims that Germany could only bring the Liechtenstein property within the scope of the Settlement Convention, as a matter of international law, on the condition that it pays compensation for the loss of that property. It claims that by treating Liechtenstein property as covered by the Settlement Convention, Germany was unjustly enriched; that Germany thereby acted to the manifest detriment of Liechtenstein, and that in consequence as a matter of international law Germany breached its international obligations to Liechtenstein. These claims may or may not prove to be ultimately well founded under international law - that is a matter for the merits. But they self-evidently do not raise issues which are solely or exclusively within Germany's domestic jurisdiction. As a result of the arguments and instruments relied on, the parties are placed "on the plane of international law" - to use the language of the Court in the *Right of Passage* case[56] - and not solely or exclusively upon the plane of the domestic law or jurisdiction of Germany.

2.20 It is relevant to note that in the two rounds of diplomatic negotiations on the present dispute, Germany never suggested that the matter was exclusively within its domestic jurisdiction, with the result that Liechtenstein had no standing even to inquire into the treatment of the Liechtenstein property. On the contrary - as shown in Part One above and in further detail in the Appendix - Germany sought to justify its conduct as valid and lawful, or at any rate as involving an arguable construction of the Settlement Convention.

2.21 In fact other aspects of Germany's plea to the Court's jurisdiction themselves illustrate that the matter is not solely within its domestic jurisdiction. For example, Germany argues that issues of international responsibility cannot be determined in the absence of Czechoslovakia (or its successor States), which should properly be the Defendant. In short it relies on the *Monetary Gold* argument. The reasons why that argument cannot avail Germany in the present case are set out in Chapter 5, below. But in any event, it cannot be the case *both* that the *Monetary Gold* principle even arguably applies *and* that the matter falls solely within the domestic jurisdiction of the Defendant State. By definition the *Monetary Gold* principle involves cases where the legal positions of two States, the Defendant State and an absent State, are so intertwined that the former's rights or obligations cannot be determined in the absence of the latter.[57] Merely to invoke the *Monetary Gold* principle is, in effect, to accept that the matter is one on which certain international legal grounds (*titres*) are of juridical importance for the dispute - in other words, that the matter is not solely within the domestic jurisdiction of the State invoking that principle.

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[56] *Ibid.*

[57] See Case *concerning East Timor*, *I.C.J. Reports* 1995, p. 90.

2.22 Germany argues that because "a rule of public international law which German courts should have applied in this case does not exist", therefore the matter falls within Germany's domestic jurisdiction.[58] That argument is strongly reminiscent of India's fifth preliminary objection in the *Right of Passage* case - discussed above - that Portugal's asserted rights did not exist or were not reasonably arguable.[59] Such an assertion is a matter for the merits.

2.23 But in any event (1) Germany's argument assumes that the issue before this Court is exclusively the issue that was before the German courts, concerning the Pieter van Laer painting; and (2) that all this Court can do is to ask how the German courts should have decided the *Pieter van Laer* case. In both respects Germany is wrong.

2.24 As to the first point, it has already been explained that the present dispute concerns not just the treatment of the Pieter van Laer painting but the general position which it has become clear Germany now takes towards all the Liechtenstein property, viz., that it falls within the scope of the Settlement Convention, i.e. that it was "seized for the purpose of reparation or restitution" as a result of World War II. The question whether Germany is entitled to take that position is not a matter falling within Germany's domestic jurisdiction, even arguably - let alone solely.

2.25 As to the second point, it is not the function of international courts (in the absence of any special provision to the contrary) to act as courts of appeal of national courts. This Court is not asked to rewrite the judgments of the German courts but to determine for itself, in the light of applicable rules of international law, whether the conduct of Germany is or is not consistent with its obligations towards Liechtenstein, and whether, in light of Germany's conduct, it is obliged by international law to compensate Liechtenstein. Again, these questions do not fall (even arguably, let alone solely) within Germany's domestic jurisdiction.

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[58] GPO, para. 109.

[59] See above paras. 13-14.

2.26 **For all these reasons, Germany's reliance on the domestic jurisdiction principle, as embodied in Article 27 (b) of the European Convention, must fail.**

CHAPTER 3

GERMANY'S ARGUMENT THAT THE DISPUTE FALLS OUTSIDE THE COURT'S JURISDICTION *RATIONE TEMPORIS*

A. Introduction

3.1 Liechtenstein now turns to Germany's argument based on Article 27 (a) of the European Convention, i.e. concerning the temporal jurisdiction of the Court.

3.2 As stated in Liechtenstein's Application,[60] and elaborated in its Memorial, the present dispute between Germany and Liechtenstein arose as a result of a series of decisions of the German courts, beginning in 1995 and culminating in the final decision of the Federal Constitutional Court in 1998. As result of subsequent developments, including statements made by the Agent for Germany before the European Court of Human Rights (the ECHR)[61] and similar statements made by German representatives in bilateral discussions,[62] it became clear that the dispute was not limited to a single painting (the Kalkofen painting by Pieter van Laer) but that it extended to all the Liechtenstein property.

3.3 Despite these facts, Germany argues[63] that the present claim falls outside the Court's jurisdiction *ratione temporis*. In support of its temporal objection, Germany relies on Article 27 (a) of the European Convention, which provides as follows:

> "The provisions of this Convention shall not apply to:
> (a) disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute; ..."

3.4 It is agreed between the parties that the relevant date for the purposes of Article 27 (a) is 18 February 1980. This is the date on which the European Convention entered into force as between the two States. The question is whether the dispute between Liechtenstein and Germany is one "relating to facts or situations prior to the entry into force of this Convention" as between Liechtenstein and Germany.

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[60] Application, para. 15.

[61] Memorial, paras. 3.37-3.41.

[62] See above paras. 6 and 1.6; Memorial, paras. 3.42-3.58.

[63] GPO, paras. 64-105.

3.5 Before turning to the question of the interpretation of Article 27 (a), it is necessary to stress that the purpose of the European Convention is the settlement of disputes between European States. Too extensive an interpretation of the phrase "relating to facts or situations prior to the entry into force of this Convention" would undermine the object and purpose of the Convention. Most international disputes have a historical origin, often extending over a considerable period, and Europe is no exception. But, in applying or interpreting jurisdictional reservations or exceptions *ratione temporis*, the Court has never dwelt on the underlying or ultimate causes of disputes. Still less has it dwelt on the (often distant) origins of the legal situations in issue or of the obligations said to have been breached.

3.6 In invoking this exception to jurisdiction, Germany purportedly relies on a series of decisions of this Court and its predecessor, in particular *Phosphates in Morocco*, the *Electricity Company of Sofia and Bulgaria* case and the *Right of Passage* case.[64] But it gravely misreads these decisions. In effect it calls upon the Court - at the stage of preliminary objections - to act as a kind of forensic archaeologist, to dig deeper and deeper into the past so as to say that here, at some remote interval, lies the "real source", the *fons et origo*, the primal event without which there would now be no dispute. But this is not how the Court has interpreted these jurisdictional exceptions (B). Applying the Court's repeatedly reaffirmed test, the present dispute falls within jurisdiction (C).

3.7 As a preliminary point, it should be noted that most of the decisions dealing with the *ratione temporis* objection involved the so-called "Belgian" reservation, the two-pronged reservation limiting the Court's jurisdiction to disputes arising after a specific date with respect to situations or facts subsequent to that date. For the Court to have jurisdiction notwithstanding a reservation of this type, two distinct conditions must be met: the dispute must have arisen after the critical date, and it must be one relating to situations or facts subsequent to that date. In fact, Article 27 (a) of the European Convention contains only a single limitation, for "disputes relating to facts or situations prior to" the critical date. In its Preliminary Objections, Germany discusses the case-law dealing with the Belgian reservation on the basis that it is equally applicable to Article 27 (a).[65] Liechtenstein agrees with this approach. In the present case, no dispute existed between the parties as to the subject of the present proceedings prior to 1995. Thus the only question is whether the dispute which then arose relates to situations or facts prior to 1980, and that question is in substance exactly the same as the question raised by the second prong of the "Belgian" reservation.

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[64] *Phosphates in Morocco*, 1938 PCIJ, Ser. A/B, No. 74, p. 22; *Electricity Company of Sofia and Bulgaria*, 1939 PCIJ, Ser. A/B, No. 77, pp. 81 *et seq.*; *Right of Passage* case, *I.C.J. Reports* 1960, pp. 6 *et seq.*

B. The Court's approach to *ratione temporis* reservations

3.8 The issue of how to interpret reservations *ratione temporis* first arose before the Permanent Court in *Phosphates in Morocco*. In 1931 France had accepted the Court's jurisdiction "in any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification".[66] Italy, also a party to the Optional Clause, commenced proceedings in 1936 complaining that Italian nationals had been deprived of their rights to prospect for phosphates. In particular it pointed to a Moroccan decree of 1920 and a decision of the Mines Department in 1925. Italy argued that the international wrong was only perfected when the French authorities in Morocco failed to overturn these decisions or to provide any remedy for them.

3.9 The Court disagreed. In its view:

> "The situation which the Italian Government denounces as unlawful is a legal position resulting from the legislation of 1920; and... cannot be considered separately from the legislation of which it is the result ... If,

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[65] See, e.g., GPO, para. 67.

[66] *Phosphates in Morocco*, 1938 PCIJ, Ser. A/B, No. 74, p. 22.

> by establishing the monopoly, Morocco and France violated the treaty régime of the General Act of Algeciras of April 7th, 1906, and of the Franco-German Convention of November 4th, 1911, that violation is the outcome of the dahirs of 1920. In those dahirs are to be sought the essential facts constituting the alleged monopolization and, consequently, the facts which really gave rise to the dispute regarding this monopolization. But these dahirs are 'facts' which, by reason of their date, fall outside the Court's jurisdiction."[67]

Italy argued that the breach in question was a continuing wrongful act, and it also relied on later acts, in particular an alleged denial of justice in the period 1931 - 1933, to avoid the operation of France's reservation. The Court rejected both arguments. The notion of a continuing wrongful act was irrelevant from the point of view of its jurisdiction: if the dispute over an allegedly wrongful act arose before 1931 and concerned situations or facts prior to that date, whether the wrongful act continued after 1931 made no difference:

> "an examination of the justice of this complaint [as to a continuing wrongful act] could not be undertaken without extending the Court's jurisdiction to a fact [sc., the decision of 1925] which, by reason of its date, is not subject thereto".[68]

3.10 As to Italy's argument based on denial of justice, the Court said that it did not represent a "new fact which could have given rise to the present dispute":

> "In its Application the Italian Government has represented the decision of the Department of Mines as an unlawful international act ... That being so, it is in this decision that we should look for the violation of international law - *a definitive act which would, by itself, directly involve international responsibility*. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States. In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative

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[67] *Ibid.*, pp. 25-26.

[68] *Ibid.*, p. 29.

> or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it.
>
> ...
>
> Accordingly, whatever aspect of the question is considered, it is the decision of the Department of Mines of January 8th, 1925, which is always found, in this matter of the dispossession of the Italian nationals, to be *the fact with regard to which the dispute arose.*"[69]

3.11 Thus the Court interpreted the French reservation *ratione temporis* as requiring it to determine the "fact with regard to which the dispute arose", the specific act which (according to the claim presented in the Application) definitively gave rise to the Defendant's responsibility - or would do so if the view of the law and the facts presented by the Applicant were to be upheld by the Court. By clear implication, the background situation (even if necessary to the dispute in the sense that without it the dispute would not have arisen) was not a situation or fact capable of triggering the French exception *ratione temporis*. Nor of course was the origin or date of the obligation said to have been breached. Both the background situation and the obligation invoked were necessary to an eventual finding of responsibility in accordance with the Applicant's case, but neither individually nor together were they sufficient to sustain the claim.

3.12 The question may thus be presented as follows: which fact or situation was both necessary and sufficient, in the circumstances alleged by the Applicant, to give rise to responsibility, assuming of course, for this purpose, that the Applicant's legal arguments were to be sustained? In *Phosphates in Morocco* the necessary and sufficient cause was the decision of January 1925, and the French reservation accordingly applied.

3.13 That this is the correct interpretation of *Phosphates in Morocco* is clear from the treatment of that decision in subsequent cases. In the following year the Permanent

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[69] *Ibid.*, pp. 28-29 (emphasis added).

Court upheld its jurisdiction under the Optional Clause notwithstanding a reservation *ratione temporis*, and in doing so authoritatively explained its earlier decision. Belgium's claim in *Electricity Company of Sofia and Bulgaria (Preliminary Objections)*[70] arose from a decision of a Mixed Arbitral Tribunal in 1923 and 1925, i.e., before the critical date of acceptance of jurisdiction, which was in 1926. Difficulties subsequently occurred in interpreting and giving effect to the Mixed Arbitral Tribunal's decision and a dispute arose after the critical date. Bulgaria argued that the crux of the dispute was the interpretation and application of the rate-fixing formula in the Tribunal's decision, and that the case therefore concerned a situation or fact prior to the critical date. The Court rejected that argument. It said:

> "It is true that it may be said that the awards of the Mixed Arbitral Tribunal established between the Belgian Electricity Company and the Bulgarian authorities a situation which dates from before March 10th, 1926, and still persists at the present time. *Nevertheless, the dispute between the Belgian Government did not arise with regard to this situation or to the awards which established it.* The Court would recall in this connection what it said in the Judgment of June 14th, 1938 (Phosphates in Morocco, Preliminary Objection). *The only situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction accepted in the terms of the Belgian declaration are those which must be considered as being the source of the dispute.* No such relation exists between the present dispute and the awards of the Mixed Arbitral Tribunal. The latter constitute the source of the rights claimed by the Belgian Company, but they did not give rise to the dispute, since the Parties agree as to their binding character and that their application gave rise to no difficulty until the acts complained of. It is not enough to say, as it is contended by the Bulgarian Government, that if it had not been for these awards, the dispute would not have arisen, for the simple reason that it might just as well be said that, if it had not been for the acts complained of, the dispute would not have arisen. It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact. A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute. In the present case it is the subsequent acts with which the Belgian Government reproaches the Bulgarian authorities with regard to a particular application of the formula - which in itself has never been dis-

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[70] *Electricity Company of Sofia and Bulgaria*, 1939 PCIJ, Ser. A/B, No. 77, pp. 81 *et seq.*

> puted - which form the centre point of the argument and must be regarded as constituting the facts with regard to which the dispute arose."[71]

The Permanent Court thus looked for the source of the dispute, not in the sense of an ultimate or anterior cause but in the sense of the direct occasion which gave rise to the dispute and which in fact constituted "the centre point of the argument".

3.14 The present Court has adopted the same approach in a number of cases.

3.15 In the *Right of Passage* case, India in its sixth preliminary objection invoked an Optional Clause reservation in similar terms to the Belgian reservation. The Court observed that the dispute had a number of aspects, concerning *inter alia* the very existence of a right of passage as well as the lawfulness of India's denial of that right in 1954. The Court had no difficulty in holding that the dispute relating to the denial of the right of passage could not have arisen until 1954.[72] But - more relevantly for the present case - it went on to hold that even that part of the dispute as to the *existence* of the right only arose in 1954. It said:

> "Even if we consider only the part of the dispute relating to the Portuguese claim, which India contests, to a right of passage over Indian territory, the position is the same. It is clear from the material placed before the Court that before 1954, passage was effected in a way recognized as acceptable to both sides. Certain incidents occurred, but they did not lead the Parties to adopt clearly-defined legal positions as against each other …
>
> Up to 1954 the situation of those territories may have given rise to a few minor incidents, but passage had been effected without any controversy as to the title under which it was effected …".[73]

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[71] 1939 PCIJ, Ser. A/B, No. 77, pp. 81-82 (emphasis added).

[72] *Right of Passage* case, *I.C.J. Reports* 1960, pp. 6 *et seq.*, p. 34.

[73] *Ibid.*, pp. 34-35.

Thus even where there may be some lack of agreement between the parties, as manifested by "minor incidents", it is only when the parties "adopt clearly-defined legal positions as against each other" that the dispute arises.

3.16 Moreover the Court went on to draw implications from this approach for the second question under the "Belgian" reservation, viz., whether the dispute related to facts or situations after the critical date. As it said:

> "The facts or situations to which regard must be had in this connection are those with regard to which the dispute has arisen …
>
> … It was only in 1954 that such a controversy arose and the dispute relates both to the existence of a right of passage to go into the enclaved territories and to India's failure to comply with obligations which, according to Portugal, were binding upon it in this connection. It was from all of this that the dispute referred to the Court arose; it is with regard to all of this that the dispute exists. This whole, ***whatever may have been the earlier origin of one of its parts***, came into existence only after [the critical date]. The time-condition to which acceptance of the jurisdiction of the Court was made subject by the Declaration of India is therefore complied with."[74]

In *Right of Passage*, this Court thus distinguished sharply between the situations or facts giving rise to the obligation said to have been breached and the situations or facts directly associated with the breach. Only the latter had to have occurred after the critical date. In this respect the approach adopted by the Court is entirely consistent with that of its predecessor, and in particular with the relatively strict interpretation of the notion of "real cause" adopted in *Electricity Company of Sofia and Bulgaria (Preliminary Objections)*.

3.17 The implications of the Court's approach can be seen very clearly from its consideration of the merits of Portugal's claim. In its judgment the Court referred to treaties concluded by the Maratha rulers of India in the 18th century and by the British in the 19th century, to Maratha *sanads* or decrees of 1783 and 1785 and to the practice of the authorities in question over the entire period (including the period before the critical date of 1930). Crucial items of practice occurred in the period 1890-1891.[75] Yet none of this impaired the Court's jurisdiction under the Optional Clause declarations of the parties.

3.18 The decision in *Right of Passage* may be contrasted with that in the *NATO* cases. There, Yugoslavia had accepted the jurisdiction of the Court by an Optional Clause declaration on 25 April 1999, with a temporal reservation along the lines of the "Belgian" reservation. The bombing campaign of which it complained had already commenced before that date and continued thereafter. Before that date, Yugoslavia had already complained of the attacks, for example to the Security Council, and the various parties had already adopted "clearly-defined legal positions". In these circumstances the Court had no doubt that a legal dispute had arisen "well before 25 April 1999 concerning the legality of those bombings as such, taken as a whole".[76] That dispute arose between Yugoslavia and each of the States associated with the campaign. The Court added:

> "Whereas the fact that the bombings have continued after 25 April 1999 and that the dispute concerning them has persisted since that date is not such as to alter the date on which the dispute arose; whereas each individual air attack could not have given rise to a separate subsequent dispute; and whereas … Yugoslavia has not established that new disputes, distinct from the initial one, have arisen between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to Belgium …"[77]

3.19 Although this was not a final decision on the question of jurisdiction, it gives a clear indication of the Court's current approach to reservations *ratione temporis*. Again the

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[74] *Ibid.*, p. 35 (emphasis added).

[75] *Ibid.*, pp. 37-44. The scope of the material considered, and the materiality of the earlier practice, can be seen from the dissenting opinion of Judge Spender *ibid.*, pp. 101-108.

[76] *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures. Order of 2 June 1999, *I.C.J. Reports* 1999, pp. 124 *et seq.*, p. 134, para. 28.

[77] *Ibid.*, pp. 134 *et seq.*, para. 29. The Court made equivalent findings in the parallel cases brought under the Optional Clause against other NATO Member States.

Court adopted the same approach to the *ratione temporis* issue as it had in the *Right of Passage* case and as its predecessor had in *Phosphates in Morocco*, and *Electricity Company of Sofia and Bulgaria (Preliminary Objections)*.

3.20 To summarize, in applying *ratione temporis* reservations or exclusions the Court looks at the facts or situations associated with the outbreak of the dispute itself. There must be a direct and proximate link between the facts or situations and the dispute: it is not enough that earlier facts or situations may have in a sense predisposed the parties in respect of the dispute. International disputes (like some industrial accidents) may be events waiting to happen. But not every potential dispute turns into an actual dispute (just as not every dangerous situation causes loss or injury). Thus in the *Right of Passage* case, the Court was prepared to overlook earlier incidents which it characterised as "minor". In retrospect it may be doubted whether India and Portugal were truly *ad idem* at any stage on the existence or extent of the right of passage, but nonetheless no dispute arose. For its part the Court looked at the events which actually occurred and identified a dispute (and the facts and situations relating to that dispute) only when the dispute actually arose, and not by way of speculation or anticipation. Under international law, there is no dispute until, as a matter of history, the crucial triggering event has occurred, leading the parties to define their opposing positions with some degree of precision. In such a case the earlier origin of some aspect of the dispute - still less of the obligation alleged to have been breached - is immaterial.

C. Applying the Court's approach, the present case is within its jurisdiction

3.21 In the present case the dispute arose only after Germany, initially through its courts and subsequently through acts of its executive organs, asserted that the Liechtenstein property was from a German point of view to be treated under the Settlement Convention, i.e., that it could properly be considered by Germany as property seized for the purpose of reparation. That was an act or series of acts of Germany clearly located in time, in the period from 1995 onwards.[78] It is true that like many State acts it has to be understood against the background of earlier events, including some before the critical date,[79] and that it took effect in relation to a legal regime, that of the Settlement Convention, which came into existence prior to that date. For the reasons given, however, none of this makes any difference to the application of the *ratione temporis* objection.

3.22 As this Court said in the *Right of Passage* case, "[t]he facts or situations to which regard must be had in this connection are those with regard to which the dispute has arisen ...".[80] The dispute arose in the 1990s, well after the critical date, with regard to the conduct of organs of the German State which occurred after that date. It was only then that Germany actually decided to treat the Liechtenstein property as falling under the Settlement Convention.

> "It was from all of this that the dispute referred to the Court arose; it is with regard to all of this that the dispute exists. This whole, whatever may have been the earlier origin of one of its parts, came into existence only after [the critical date]".[81]

Germany's two-fold approach

3.23 Faced with the Court's consistent jurisprudence, Germany adopts a two-fold approach. First, it denies that the Court's established test can be applied to the present case. Secondly, it re-characterizes, and in so doing caricatures, Liechtenstein's case.

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[78] Germany complains that Liechtenstein is inconsistent in specifying precisely when the dispute arose, see GPO, paras. 31, 98. As so often, the dispute took some time to fully emerge, given the German court processes and subsequent events. No question arises, however, for the purposes of the present preliminary objection, whether the dispute arose in 1995 or 1998.

[79] In this case, 18 February 1980 when Liechtenstein ratified the European Convention.

[80] *Right of Passage* case, *I.C.J. Reports* 1960, pp. 6 *et seq.*, p. 35.

[81] *Ibid.*

1. Germany's attempt to rewrite the Court's case-law

3.24 As to the first point, as has been demonstrated the Court's jurisprudence has consistently distinguished between:

(1) the central or catalytic fact which triggers the dispute, on the one hand, and, on the other hand, background facts which might have been necessary preconditions for a dispute to arise but which in themselves did not produce the dispute, and

(2) the actual and direct cause of the dispute, on the one hand, and, on the other hand, the bases for the right or obligation alleged to have been ignored or infringed.

3.25 In its Preliminary Objections, Germany tries to ignore both distinctions. For example, it asserts that "[i]n the present case it is quite impossible to make a meaningful distinction between the source of the rights alleged by Liechtenstein and the source of the alleged dispute".[82] This is mere assertion. In the *Right of Passage* case, the Court had no difficulty in drawing such a distinction, even with respect to that aspect of the dispute which concerned the scope of the rights claimed.[83] Similarly, here there is a clear distinction in principle between the legal situation in which the parties were placed after 1990 and the event which caused the dispute, i.e., which was its actual source.

3.26 Germany also argues that "[t]he case brought before the Court could not be decided without judging upon the reparations regime established in 1945 and thereafter".[84] But the present dispute did not arise because of the reparations regime as such. It was the decision by Germany to apply that regime to the Liechtenstein property which gave rise to the dispute. Of course in dealing with that dispute the Court will have to consider the reparations regime, but that does not make the regime the real source or center piece of the dispute in the sense of these terms adopted in the Court's jurisprudence. In the *Right of Passage* case the Court clearly "judged upon" the scope of the regime of passage between Goa and the Portuguese enclaves, and in doing so had regard to treaties and other instruments dating back to the 18th century.[85] Nonetheless it did so with respect to a dispute which only arose in 1954, when the legal positions of the parties crystallized following the outright denial by India of the right claimed by Portugal. As the Court noted, the dispute between India and Portugal did not arise because of the right of passage; it arose because that right had been denied. It was this latter fact or situation which was the focus of the dispute, and which was determinative for the purposes of jurisdiction *ratione temporis*. Precisely the same situation applies here. The seizure of the Liechtenstein property by Czechoslovakia did not give rise to the present dispute. Nor did the reparations regime. What triggered the dispute was Germany's decision to treat the Liechtenstein property as covered by the reparations regime. That decision occurred long after the critical date for the purposes of Article 27 (a) of the European Convention.

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[82] GPO, para. 77.

[83] See above para. 3.16.

[84] GPO, para. 96.

3.27 In this regard Germany asserts that the position taken by its courts involved no novel doctrine, and that the German jurisprudence has always been clear and consistent.[86] But the German courts had never previously been faced with a case concerning Liechtenstein property. It was not incumbent upon Liechtenstein to anticipate what the German courts might do, or what attitude the German executive might adopt, in the event that a case involving the quite separate issue of the Liechtenstein property were to arise. When it did arise - in the 1990s - complex questions of German civil and constitutional law had to be dealt with, as the Court will discern from reading the decisions set out in Vol. II of Germany's Preliminary Objections.[87] But the present dispute is not a dispute about the predictable or unpredictable content of German civil or constitutional law; it is a dispute about whether Germany was entitled as a matter of international law to treat any item of Liechtenstein property as covered by the Settlement Convention or as seized by way of reparation. The German judicial and executive positions, taken in the 1990s, were the necessary and sufficient source or cause of the international dispute which then immediately arose. In order to deal with this preliminary objection, the Court has no need to engage in some counter-historical speculation as to what might have happened if a similar question had arisen before the German courts before 1980. It is sufficient to say that it did not.

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[85] See above para. 3.17.

[86] GPO, para. 100. See also *ibid.*, paras. 77, 83, 86, 90, 98.

[87] Germany presents these issues as simple, straightforward and routine. Perhaps fortunately the Court is not asked to judge their degree of difficulty against some norm for German jurisprudence. But it may

2. Germany's attempt to rewrite Liechtenstein's Application

3.28 Germany's second general strategy - in response to the well-established and rather narrow approach to temporal limitations on the Court's jurisdiction - is to reformulate Liechtenstein's claims, in effect to rewrite the Application. As noted already, Germany re-characterizes, and in so doing caricatures, Liechtenstein's case.

3.29 Germany adopts its own version of the case, which bears no relationship to the actual case. It asserts that Liechtenstein's "entire case revolves around the confiscation of Liechtenstein property by Czechoslovakia in 1945 and thereafter and possible legal consequences of those confiscations".[88] This is a simple misreading. For 35 years following the seizure of the Liechtenstein property under the Beneš decrees, there was no dispute on that subject between Liechtenstein and Germany. It was only in the 1990s - following the amendment to the Settlement Convention which deleted any reference to compensation - that Germany took the position that the Liechtenstein property could properly be considered German for the purposes of that Convention, i.e., that it was covered by the reparations regime. It was at this point, and not before,

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be noted that the three decisions of the German courts did not coincide in their reasoning in all respects, and that the Federal Constitutional Court granted interim relief before its decision in the Pieter van Laer case - an unusual if not entirely unprecedented step for that Court. See further Appendix I, paras. A2-A11, for an analysis of the German case-law.

[88] GPO, para. 77.

that a dispute arose. As has already been explained, it was that decision, or series of decisions, by Germany which gave rise to the dispute and which constitutes the focal point of the present case.

3.30 Indeed Germany itself recognizes - rather oddly in terms of its submission on this point - that there was no dispute between Liechtenstein and Germany in 1980. It states that "[n]o factual or legal situation existed in 1980 on which Liechtenstein could rely".[89] As against Germany, in 1980, that was true - in the sense that there was no issue between Germany and Liechtenstein in 1980 as to the scope of the Settlement Convention, nor any confusion between them as to whether Liechtenstein property was to be treated as if it were German property. Indeed, that is precisely the point. To the extent that Liechtenstein was "completely inactive" vis-à-vis Germany in the period 1980 - 1995,[90] the reason was that the issue had not yet arisen.

3.31 Germany argues that Liechtenstein's presentation of the case focuses exclusively on events prior to 1980 - in its own words, "always prior to 1980".[91] Again this is simply untrue. Liechtenstein's Application and Memorial deal with events both before and after 1980, as appropriate. Liechtenstein has already demonstrated by reference to the Court's case-law why events prior to the critical date for the purposes of jurisdiction *ratione temporis* may nonetheless be relevant in deciding a dispute which arose subsequently and which relates to some catalytic event subsequently occurring.

3.32 In this context Germany asserts that it is "quite incorrect to see [the *Pieter van Laer* case] as the real source of the present case".[92] Yet as a simple matter of history the *Pieter van Laer* case was the trigger of the dispute, which was subsequently exacerbated when Germany applied the same principle to the Liechtenstein property in general. That case, and subsequent developments set out in Liechtenstein's pleadings, made it clear for the first time that Germany regarded the Liechtenstein property as coming within the scope of the reparations regime. Whether those decisions marked an actual change in Germany's position, or whether they applied earlier German cases to a new situation, is irrelevant for present purposes. On either hypothesis, the treatment of Liechtenstein assets as German actually occurred for the first time after 1990. It is not enough for Germany to assert that its position would have been the same if the issue of the treatment of Liechtenstein property had arisen prior to 1980. First of all, it is by no means clear that this is true: the matter was never tested, as has been shown in Chapter 1, and in further detail in Appendix 1. Indeed it was never even envisaged as a possibility, either in the case-law or in the legal literature. But even if it were to be accepted (for the sake of argument) that the *Pieter van Laer* case might have gone the same way had it arisen for decision by the German courts before 1980, to assert this is to ignore the actual history of the matter. It may be that, in the *Right of Passage* case, India would have blocked the transit of arms across its territory if an insurrection had broken out in the enclaves in 1949. But that was not what happened. For the purposes of a *ratione temporis* objection, the Court has to look at the facts as they occurred, and not to speculate on alternative scenarios. Disputes between States are historical events, not exercises of the imagination.

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[89] *Ibid.*

[90] See GPO, paras. 101-102.

[91] GPO, para. 72.

[92] GPO, para. 79.

3. Germany's attempt to avoid a merits hearing by repeated conclusory assertions

3.33 Finally, Germany makes a series of conclusory assertions on issues belonging properly to the merits.

- For example, it asserts that Germany never changed its position after 1955.[93] Liechtenstein disagrees, has specified the changes of position involved, and has shown that they occurred after 1980. That being so, *whether* there has been such a change of position is a matter for the merits.

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[93] GPO, para. 77; similarly GPO, para. 85.

- Germany asserts that "no … legal situation had ever been recognized between" Germany and Liechtenstein.[94] Again, Liechtenstein disagrees. In its view, until the 1990s the parties had a common understanding that Liechtenstein property was not German property and was not covered by the reparations regime. If Germany can show that Liechtenstein and Germany proceeded on a different assumption prior to 1995, that would be relevant to the merits, but the German argument amounts simply to a denial of Liechtenstein's case and has nothing to do with jurisdiction *ratione temporis*.
- Germany asserts that the issues of the scope of the reparations regime and the position of World War II neutrals "had run their full course prior to 1980". Yet again, Liechtenstein disagrees. These questions are still entirely live ones, capable of affecting legal and other developments to this very day.

3.34 For all these reasons, Liechtenstein submits that the Court has jurisdiction to deal with the dispute which arose between Liechtenstein and Germany in the 1990s, and that there is no relevant temporal limitation or exclusion on the Court's jurisdiction.

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[94] GPO, para. 81.

PART THREE

THE ADMISSIBILITY OF LIECHTENSTEIN'S CLAIMS AGAINST GERMANY

CHAPTER 4

GERMANY'S ARGUMENT BASED ON LACK OF SUBSTANTIATION

A. Introduction

4.1 Germany devotes 25 pages of its Preliminary Objections to an attempt to demonstrate that "Liechtenstein's claims are not sufficiently substantiated"[95]. In Liechtenstein's views, this Fourth Preliminary Objection is manifestly misconceived and does not deserve such a lengthy answer, all the more so as the main part of this "objection" is devoted in fact to discussing the substance of the case.

4.2 Germany alleges that Liechtenstein has not presented sufficient evidence as to the object and scope of the dispute and that, therefore, it is not in a position to properly argue its case. In substance, Germany contends that Liechtenstein has not demonstrated any interference by Germany with Liechtenstein property[96], that it has distorted the German case-law concerning the Settlement Convention of 1952,[97] that it has improperly substantiated its claims as far as it invokes diplomatic protection,[98] and that it has not established any violation of Liechtenstein's neutrality and sovereignty.[99] According to Germany, all these alleged weaknesses in Liechtenstein's case are the results of the choice of the wrong State as Defendant.[100]

4.3 The summary above - based simply on the titles of the sub-sections of Chapter II, Section I, of Germany's Preliminary Objections - is sufficient to conclude that this so-called "objection" is by no means preliminary in essence: it shows that Germany disputes the *merits* of Liechtenstein's case. At the same time it does confirm beyond any doubt that there exists a dispute between Liechtenstein and Germany.[101]

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[95] GPO, paras. 115-150.

[96] GPO, paras. 121-124.

[97] GPO, paras. 125-130.

[98] GPO, paras. 131-142.

[99] GPO, paras. 143-149.

[100] GPO, paras. 118-120.

[101] See above Chapter 1.

4.4 It is apparent from the very drafting of Germany's statements that it has perfectly well grasped the object and scope of the dispute and is thus in a situation to present its own case - which indeed it does throughout that Section of its Preliminary Objection devoted to the fourth so-called "Preliminary Objection" (B). In consequence, there can be no doubt that Liechtenstein's Application and Memorial do meet the requirements of the Court's Statute (Article 40 (1)) and Rules (Article 38 (2)) (C). Moreover, if it were true that Liechtenstein has not given sufficient factual or legal evidence of its case, it is certainly not a preliminary matter and it falls on Liechtenstein to lay out its case at the stage of the merits (D).

B. Germany actually understands the object and scope of the present dispute

4.5 Germany alleges:

> "The present case … is absolutely unique in the history of adjudication in that the Applicant refrains from providing almost all of the relevant factual data. Neither can Germany guess what is really at stake, nor will the Court be able to grasp the essence of this case, in particular its factual dimension".[102]

4.6 With respect to the violation of Liechtenstein's sovereignty and neutrality, Germany has no difficulty in grasping the object of Liechtenstein's case and adds:

> "Liechtenstein contends … that it … suffered direct damage through the conduct of German authorities, primarily its courts. It claims that Germany violated its sovereignty as an independent third State as well as its status of neutrality during the Second World War".[103]

4.7 Such statements show without the shadow of a doubt that both the Application and the additional clarifications and developments in the Memorial have been rightly understood by Germany. Definitely, the inclusion of Liechtenstein's assets under the reparations scheme as a result of the decisions of the German courts, subsequently endorsed by the German authorities, during the 1990s, is the cornerstone of the present dispute and constitutes the (complex) internationally wrongful act that Liechtenstein complains of. It is thus the "very essence" of the present dispute, and Germany perfectly understood this. Furthermore, the German courts had not previously dealt with Liechtenstein assets: that is not in dispute.

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[102] GPO, para. 117.

[103] GPO, para. 143.

4.8 Moreover, Germany complained of the insufficient substantiation of Liechtenstein's allegations making impossible any attempt to "organize its defence". Once again, the drafting of the Preliminary Objections and their content demonstrate the contrary. Germany is not at all in the "dire situation"[104] it blames Liechtenstein for. The entire Forth German Preliminary Objection constitutes a discussion (albeit unconvincing) of the merits of Liechtenstein's claims.

4.9 The core of this Section of the Preliminary Objections consists of Germany's allegations according to which the facts and the legal arguments brought to the Court by Liechtenstein are not founded or amount only to a "purposeful invention". This is apparent in respect with:

- the attribution to Germany of the losses sustained by Liechtenstein and its nationals;[105]

- the reality and nature of these losses;[106]

- the interpretation of the jurisprudence of the German courts which initiated Germany's change of position;[107]

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[104] GPO, para. 116.

[105] GPO, paras. 119-120.

[106] GPO, paras. 138-142.

[107] GPO, paras. 123 and 125.

- the conclusions to be drawn from Germany's endorsement of this case-law;[108]

- the violation of Liechtenstein's neutrality and sovereignty.[109]

4.10 The preliminary objections phase is, by no means, the proper occasion for a rebuttal of these ill-founded arguments and Liechtenstein does not intent to present a response to these allegations at this stage of the proceedings. However they certainly prefigure the German argument on the substance of the case and show that Germany was effectively in a position to develop a defence to Liechtenstein's submissions, and that it undertook to do this by using the facts and legal statements contained in both the Application of 30 May 2001 and the Memorial of 28 March 2002. Consequently, it is to be acknowledged that Germany is certainly not in the "dire situation" it claims.

4.11 Germany is in fact seeking to slip over to the merits stage of the case trying to establish the absence of its "change of position". Time and again, Germany denies that it changed its position by any means whatsoever. Thus, it states

> "explicitly that the alleged 'change of position of Germany' never occurred and is neither based on or supported by any demonstrable facts".[110]

4.12 This allegation, which is the very essence of Germany's argument in its "Preliminary Objections", is clearly an argument on the merits of the case, not a preliminary matter. It confirms not only that, contrary to Germany's First Preliminary Objection ("There exists no dispute between Liechtenstein and Germany"), there is a real dispute between Germany and Liechtenstein concerning the meaning and the consequences of the German tribunals' decisions and the interpretation of the facts as well as the subsequent endorsement of these decisions by the German Government. Moreover, this allegation is not of a preliminary nature; it pertains to the merits of the case, not to its admissibility.

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[108] GPO, paras. 126-128.

[109] GPO, paras. 143-149.

4.13 As Shabtai Rosenne explained:

> "it is probable that when the facts and arguments in support of the objection are substantially the same as the facts and arguments on which the merits of the case depend, or when to decide the objection would require a decision on what, in the concrete case, are substantive aspects of the merits, the plea is not an objection but a defense to the merits".[111]

This holds true for virtually all the "objections" raised by Germany, not only the fourth one: in the present case, the Court could not make a pronouncement on any of them without prematurely taking a position on facts and arguments pertaining to the merits of the case.

C. The Lichtenstein's Application and Memorial meet the requirements of the Court's Statute and Rules

4.14 The fact that Germany grasps perfectly well the "very essence" of the dispute from Liechtenstein's Application and Memorial constitutes strong evidence of their conformity with the requirements of the Court's Statute and Rules. Article 40 (1) of the Statute of the Court provides:

> "Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated".

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[110] GPO, para. 32.

[111] S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, 3rd ed., Nijhoff, The Hague, 1997, Vol. II, p. 915.

Article 38 (2) of the Rules of the Court further details these requirements with regard to the Application:

> "The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based".

4.15 Germany has correctly explained the meaning and scope of these requirements.[112] These provisions do not require a "complete" statement of facts and grounds, but only a "succinct" one.[113] In the *Northern Cameroons* case, the Court decided

> "that whilst under Article 40 of its Statute the subject of a dispute brought before the Court shall be indicated, Article 32 (2) of the Rules of Court [presently Article 38 (2)] requires the Applicant 'as far as possible' to do certain things. These words apply not only to specifying the provision on which the Applicant founds the jurisdiction of the Court, but also to stating the precise nature of the claim and giving *a succinct statement of the facts and grounds on which the claim is based*".[114]

4.16 This is precisely what the Application of 30 May 2001 does in the present case. It contains "a succinct statement of the facts and grounds on which the claim is based" and provides an overview of the factual and legal issues of the case which is to be argued and developed in the course of the proceedings. Liechtenstein has clearly indicated the underlying grounds, i.e. the change of position of Germany by a series of judicial decisions, subsequent conduct, and diplomatic exchanges,[115] including a brief summary of the relevant facts which occurred prior to the change of position.[116] Simultaneously it has set out the main legal grounds on which its claims are based.

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[112] GPO, para. 117.

[113] See *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, 11 June 1998, *I.C.J. Reports* 1998, p. 318, para. 98.

[114] *Northern Cameroons* case, Preliminary Objections, *I.C.J. Reports* 1963, p. 28 (emphasis added).

[115] Application, paras. 17-20.

[116] Application, paras. 4-16.

4.17 As for the Memorial of 28 March 2002, it does "contain a statement of the relevant facts, a statement of law, and the submissions" as required in Article 49 of the Rules of Court. It clearly meets the requirements enunciated by the Permanent Court of International Justice in the *Phosphates in Morocco* case when it stated that it was necessary

> "that the explanations furnished in the course of the written and oral proceedings enable it to form a sufficiently clear idea of the nature of the claim ...".[117]

4.18 In its Memorial, Liechtenstein has detailed its presentation of the decisions of the German courts and tribunals concerning the *Pieter van Laer* case,[118] the statements of the Municipality of Cologne[119] and of the Federal Republic.[120] All these explanations sustain its claims. Furthermore, very detailed legal arguments have been made in the Memorial - a fact which has been acknowledged by Germany,[121] more specifically on the violations of international law constituted by the German conduct.

4.19 Of course, it is Germany's right to challenge Liechtenstein's views both concerning the facts and the law at the stage of the merits and, as shown above (paras. 4.11 - 4.12), this is precisely what Germany does in its Preliminary Objections, more particularly in Section 1 of Chapter II of Part III. However, the mere fact that Germany is in a position to do so, suffices to show that Liechtenstein's Application and Memorial comply with the requirements of Article 40 of the Statute and Articles 38 (2) and 49 (1) of the Rules of the Court, and deprives the fourth German Preliminary Objection of any justification.

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[117] *Phosphates in Morocco*, 1938 PCIJ, Ser. A/B, No. 74, p. 21.

[118] Memorial, paras. 3.17-3.30.

[119] Memorial, paras. 3.31-3.36.

[120] Memorial, paras. 3.37-3.58.

[121] GPO, para. 116.

4.20 One more specific point must be dealt with. Germany alleges that Liechtenstein fails to indicate the identity of the victims and assets affected by its allegedly wrongful acts[122] and concludes that "Liechtenstein has failed to demonstrate that the right to diplomatic protection which it invokes does in fact exist".[123] This German argument is factually erroneous and legally misleading.

4.21 It is not true that Liechtenstein failed to indicate the name of the victims: it has provided the Court and Germany with a list of the families affected by the confiscation measures of 1945 - this list appears in Annex 8 to the Memorial and is commented in the Memorial itself, as acknowledged by Germany.[124] Moreover, as explained in the Memorial,[125] the main victims are the Reigning Prince of Liechtenstein and his family and Germany itself acknowledges that, as far as he is concerned, it has sufficient information in order to present its case:

> "In any event, to date, Germany has no clues who, *apart from the ruling Prince himself*, in 1995 believed to have property claims against the Czech Republic which, allegedly, were brought to extinction by the jurisprudence of the German courts".[126]

4.22 Liechtenstein certainly accepts that its case is, partly, based on diplomatic protection: as a consequence of Germany's new position (initially on the occasion of the case of the *Pieter van Laer* painting) all the owners of the property confiscated in 1945 are affected by the Germany's wrongful act. However, it must be firmly recalled that the present case cannot be seen as exclusively a diplomatic protection case. As a consequence of its new position, Germany has violated the rights of Liechtenstein itself under international law.

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[122] GPO, paras. 132-142.

[123] GPO, paras. 132-142.

[124] GPO, para. 133.

[125] See, e.g., Memorial, paras. 1.20-1.21.

[126] GPO, para. 135 (emphasis added).

4.23 As is made apparent by the Submissions in the Memorial, the Court is requested "to adjudge and declare that: (a) by its conduct with respect to Liechtenstein (…), Germany has failed to respect the sovereignty and neutrality of Liechtenstein…".[127] The declaration by the Court that Germany's conduct entails its responsibility vis-à-vis Liechtenstein itself is a prerequisite to any pronouncement on its responsibility based on diplomatic protection. The obligation of Germany to compensate the losses sustained by Liechtenstein's nationals stems from the inclusion of the Liechtenstein assets in the reparations regime under its breach of the neutrality and sovereignty of the Principality.

4.24 Moreover, what is required from the Court as to the responsibility of Germany in the Memorial of Liechtenstein is, in a first stage of the proceedings, purely a declaration that Germany has violated the rights of Liechtenstein and its nationals and that:

> "(c) consequently, Germany has incurred international legal responsibility and is bound to provide appropriate assurances and guarantees of non-repetition, and to make appropriate reparation to Liechtenstein for the damage and prejudice suffered".[128]

4.25 As is made very clear in paragraph 2 of Liechtenstein's Submissions, the issue of compensation will be the object of the second phase of the proceedings:

> "Liechtenstein further requests that the amount of compensation should, in the absence of agreement between the parties, be assessed and determined by the Court in a separate phase of the proceedings".[129]

4.26 Such a request is far from being unusual before international courts and tribunals, including the International Court. It has been formulated, for example, in the following cases:

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[127] GPO, Submission 1 (a).

[128] Memorial, p. 187, Submissions, para. 1 (c).

[129] Memorial, p. 187.

- *Military and Paramilitary Activities in and against Nicaragua*;[130]
- *Oil Platforms*;[131]
- *Gabčíkovo-Nagymaros Project*;[132] and
- *Land and Maritime Boundary between Cameroon and Nigeria*.[133]

In none of these cases, has the Court objected to such a request and it has expressly granted it in all the cases where the procedure reached the phase of the merits.

4.27 Thus, in *Nicaragua*, the Court, after having established the legal obligation of the United States to pay compensation[134] granted the request of Nicaragua and decided "that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case".[135] Moreover, in the motives of its Judgment, the Court considered

> "appropriate the request of Nicaragua for the nature and amount of the reparation due to it to be determined in a subsequent phase of the proceedings. ... The opportunity should be afforded Nicaragua to demonstrate and prove exactly what injury was suffered as a result of each act of the United States which the Court has found contrary to international law. ... It goes without saying however, that in the phase of the proceedings devoted to reparation, neither party may call into question such findings in the present judgment as have become *res judicata*".[136]

Liechtenstein accepts that the same will hold true in the present case.

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[130] See *Merits*, 27 June 1986, *I.C.J. Reports* 1986, p. 20, para. 15.

[131] See *Preliminary Objection*, 12 December 1996, *I.C.J. Reports* 1996, p. 807, para. 9 (Application) and 10 (Memorial) or Order, 10 March 1998, *Counter-Claim*, pp. 191-192, para. 1 (Application) and 2 (Memorial).

[132] See Judgment, 25 September 1997, *I.C.J. Reports* 1997, pp. 15-17, para. 13 (Submissions in the Memorials of both, Hungary and Slovakia), para. 14 (Submission in the oral pleadings of Slovakia).

[133] See *Preliminary Objections*, 11 June 1998, *I.C.J. Reports* 1998, p. 282, para. 16-17 (Application) and p. 284, para. 18 (Memorial).

[134] Operative paragraphs 13 and 14 of the Judgment.

[135] Operative para. 15 of the Judgment, adopted by 14 votes to one, *Merits*, 27 June 1986, *I.C.J. Reports* 1986, p. 149.

[136] *Ibid.*, pp. 142-143, para. 284.

4.28 In the case concerning the *Gabčikovo-Nagymaros Project*, the Court pointed out that it had "not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid.",[137] thus implicitly deferring the determination of the compensation for a subsequent phase of the proceedings.

4.29 It is only when it has decided that Germany bears responsibility for its internationally wrongful acts that the Court will be called upon to decide on the compensation for the losses sustained by Liechtenstein as a consequence of these acts. And it is only during this subsequent phase of the proceedings that the Parties will be in a position to discuss the Liechtenstein assets concerned and the amount of compensation to be paid by Germany. It would therefore have been most inappropriate for Liechtenstein to deal, in its Memorial, with facts and data which can only be relevant in this last and subsequent phase of the procedure.

4.30 Since the purpose of the first merits phase of the proceedings is exclusively to obtain from the Court a declaration acknowledging the responsibility of Germany Liechtenstein has limited itself to set out all the necessary elements to this aim - and these elements only. However, since Germany seems to imply that Liechtenstein is trying to hide "indispensable facts" from both the Court and the Defendant, Liechtenstein has annexed to the present Statement a partially updated list of the persons whose assets are affected by the present proceedings as well as indications of the assets concerned.[138]

4.31 As for the principle of Germany's responsibility, which alone is at stake during the first stage of the procedure on the merits, a simple reading of Liechtenstein's Application and Memorial shows that the factual and legal allegations put forward by Liechtenstein are neither vague nor imprecise. They are more than sufficient to permit Germany to answer these arguments which, alone, are relevant at this stage of the proceedings - and Germany is prematurely attempting to do so. Thus both Liechtenstein's Application and its Memorial are sufficiently substantiated and meet the requirements of Article 40 (1) of the Statute and Articles 38 (2) and 49 (1) of the Rules of Court.

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[137] *Gabcikovo-Nagymaros Project*, 25 September 1997, *I.C.J. Reports* 1997, p. 81, para. 152.

[138] Annex 49.

D. Lack of sufficient evidence is not a preliminary matter

4.32 The claims made by Germany in this respect cannot be reconciled with the usual rules of evidence before international tribunals as they are embodied in the Rules of the International Court.

4.33 All the writers who have discussed this matter concur in thinking that the burden of proof falls on the party which alleges a fact. According to D.W. Sandifer in his well-known book, *Evidence Before International Tribunals*,

> "The broad basic rule of burden of proof adopted, in general, by international tribunals resembles the civil law rule and may be simply stated: That the burden of proof rests upon him who asserts the affirmative of a proposition which if not substantiated will result in a decision adverse to his contention".[139]

Similarly, according to Witenberg:

> "En d'autres termes, le grand principe sera d'imposer à celui même qui a avancé le fait, la charge de la preuve" ("In other terms, the main principle consists in imposing the burden of proof on the one who alleges the fact)".[140]

4.34 This has been the clear position of the I.C.J. in the case concerning *Military and Paramilitary Activities in and against Nicaragua*:

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[139] Foundation Press, Chicago, 1939, pp. 92-93.

[140] J.-C. Witenberg, "*Onus probandi* devant les juridictions arbitrales", *Revue général de Droit inter-*

> "Ultimately … however, it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof".[141]

4.35 In its Judgment of 11 June 1998 on the *Preliminary Objections* in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court endorsed this statement and recalled that "[i]t is the applicant which must bear the consequences of an application that gives an inadequate rendering of the facts and grounds on which the claim is based".[142] Again, in its Judgment of 10 October 2002, the Court rejected the Parties claims relating to the responsibility of, respectively, Cameroon and Nigeria, based on facts not sufficiently proven by the other Party.[143]

4.36 This is in keeping with Article 53 (1) of the Statute according to which:

> "Whenever one of the parties does not appear before the Court, *or fails to defend its case*, the other party may call upon the Court *to decide in favour of its claim*".

It goes without saying that by "deciding in favour" of the failing party the Court is called upon to pass a judgment on the merits, while the expression "fails to defend its case" can be transposed, *mutatis mutandis*, to a situation where a State defends its case but does not substantiate it properly. In such a case, it is upon the Court to decide in favour of the other party on the points which have not been substantiated to its satisfaction. But this must be done at the merits stage, not as a matter of admissibility.

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national public, 1951, p. 323.

[141] *I.C.J. Reports* 1984, p. 437, para. 101.

[142] *Land and Maritime Boundary Between Cameroon and Nigeria*, Preliminary Objections, 11 June 1998, *I.C.J. Reports* 1998, p. 319, para. 101.

[143] Case concerning the *Land and Maritime Boundary Between Cameroon and Nigeria*, paras. 321-324.

4.37 It is all the more logical and self-evident that "Article 38, paragraph 2 [of the Rules of Court], does … not preclude later additions to the statement of the facts and grounds on which a claim is based".[144] And, similarly, Article 49 imposes on the Applicant the obligation to state the relevant facts and law in the Memorial (paragraph 1) and authorizes it to complete its case in the Reply (paragraph 3), and, to a limited extent (see Articles 56 and 60) during the hearings.

4.38 The only limit on the freedom of the Applicant to present new facts and legal considerations until the end of the procedings

> "is 'that the result is not to transform the dispute brought before the Court in another dispute which is different in character' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. united States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80)".[145]

But Germany does not allege that Liechtenstein has done so in the present case.

4.39 It therefore must be concluded that:

(i) Liechtenstein has properly substantiated its claims in law and in fact;

(ii) The substantiation of the Application and the Memorial meet the requirements of Articles 38 and 49 of the Rules of Court;

(iii) In the guise of challenging the admissibility of Liechtenstein's claims, Germany, in fact, discusses them on the merits;

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[144] *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, 11 June 1998, *I.C.J. Reports* 1998, p. 318, para. 98.

[145] *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, 11 June 1998, *I.C.J. Reports* 1998, pp. 318-319, para. 99; see also, e.g., *Société Commerciale de Belgique*, 1939 PCIJ, Ser. A/B, No. 78, p. 173 or *Interhandel* case, 21 November 1959, *I.C.J. Reports* 1959, p. 21.

(iv) This discussion shows that Germany has well grasped the substance of Liechtenstein's argument, even if it does not answer it convincingly;

(v) Such a discussion belongs to the merits of the case, not to its admissibility;

(vi) It is only at the end of the proceedings that the Court will be in a position to evaluate the evidence submitted by both Parties; and

(vii) Each Party takes responsibility for substantiating its own claims.

CHAPTER 5

GERMANY'S ARGUMENT RELATING TO THE ABSENCE OF THE CZECH REPUBLIC FROM THE PRESENT PROCEEDINGS

A. Introduction

5.1 In its Fifth Preliminary Objection Germany challenges the admissibility of the present proceedings due to the "so-called indispensable third party rule".[146] In its view, the successor States of Czechoslovakia, in particular the Czech Republic, which have not consented to the jurisdiction of the Court, are indispensable parties to the present case. Allegedly, the Court could not decide on the responsibility of Germany but by addressing the issues of, first, the existence *vel non* of any reparations claim between Germany and the Czech Republic, and second, the lawfulness of the Beneš Decrees.

5.2 Germany has elaborated on the meaning of the "so-called indispensable third party rule" by reference to well-known extracts of Judgments delivered by this Court.Liechtenstein does not disagree with this presentation as far as it goes; but it is nevertheless very partial. Therefore it deems it necessary to make clearer the exact scope of the said rule (B). However, even if Germany's argument concerning the content of the indispensable third party rule is acceptable in substance, the consequences it draws from these findings are erroneous. Neither Czechoslovakia nor any of its successor States are an indispensable third party to these proceedings (C).

B. The "indispensable third party rule"

5.3 The German Preliminary Objections devote much effort to clarifying, once again before this Court, the regime of the "indispensable third party rule" resulting from the

> "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent".[147]

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[146] GPO, para. 151.

[147] *Monetary Gold Removed from Rome in 1943*, 15 June 1954, *I.C.J. Reports* 1954, p. 32.

5.4 On the basis of the Court's judgments in the *Monetary Gold*,[148] *Certain Phosphate Lands in Nauru*[149] and *East Timor*[150] cases which it cites at length, the Defendant State reaches the following conclusion:

> "The jurisprudence of the Court concerning the indispensability of third parties is crystal clear: If the legal interests of a third State constitute the 'very subject-matter' of a dispute brought to the Court and the third State is absent from the proceedings, the Court cannot exercise jurisdiction on the matter. Legal interests of a third State do constitute the very subject-matter of a dispute if the Court cannot decide on the claims before it without prior determination as to rights or obligations of the third State".[151]

Liechtenstein agrees with this conclusion which reflects the content of the "*Monetary Gold* principle".

5.5 However, this principle has two different aspects, and Germany deliberately omits to take into account the other aspect of the "indispensable third party rule", or of the rule of "consensual jurisdiction". In effect, the findings of the Court in the *Monetary Gold removed from Rome in 1943* case also imply that the Court *is not barred* from delivering a judgment for the sole reason that a third and absent State might be "affected" by a decision. As the Court put it in the *Continental Shelf (Libya / Malta)* case:

> "In the absence in the Court's procedures of any system of compulsory intervention, whereby a third State could be cited by the Court to come in as a party, it must be open to the Court, indeed its duty, to give the fullest decision it may in the circumstances of each case, unless of course, as in the case of the *Monetary Gold Removed from Rome in 1943*, the legal interest of the third State 'would not only be affected by a decision, but

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[148] *Monetary Gold Removed from Rome in 1943*, 15 June 1954, *I.C.J. Reports* 1954, p. 19.

[149] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, *I.C.J. Reports* 1992, p. 240.

[150] *East Timor (Portugal v. Australia)*, 30 June 1995, *I.C.J. Reports* 1995, p. 90.

[151] GPO, para. 166.

> would form the very subject-matter of a decision' (*I.C.J. Reports 1954*, p. 32), which is not the case here".[152]

This is also the meaning of the Court's statement in its Judgment concerning Nicaragua's Application to intervene in the *Case concerning the Land, Island and Maritime Frontier Dispute*:

> "Thus, the Court's finding [in the *Monetary Gold Removed from Rome* in 1943 case] was that, while the presence in the Statute of Article 62 might impliedly authorize continuance of the proceedings in the absence of a State whose 'interests of a legal nature' might be 'affected', this did not justify continuance of proceedings in the absence of a State whose international responsibility would be the 'very subject-matter of the decision'".[153]

5.6 This doctrine is also reflected in the Court's Judgment in the *Nauru* case. The Australian objection regarding the absence of the United Kingdom and New Zealand, the two other States parties to the Trusteeship Agreement, in the proceedings was rejected by the Court since the interests of the United Kingdom and of New Zealand did not form the "subject matter" of that dispute.[154] However, the Court pointed out that those States were free to refer to Article 62 of the Statute in order to intervene, if an interest of a legal nature belonging to them might be affected by the decision of the case. It continued:

> "But the absence of such a request [to intervene] in no way precludes the Court from adjudicating the claims submitted to it, provided that the legal interests of third States which may possibly be affected do not form the very subject-matter of the decision that is applied for. Where the Court is

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[152] *Continental Shelf (Libyan Arab Jamahiriya/ Malta)*, Italy's Application to Intervene, 21 March 1984, *I.C.J. Reports* 1984, p. 26, para. 40.

[153] *Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras)*, Judgment on Nicaragua's Application to Intervene, 13 September 1990, *I.C.J. Reports* 1990, pp. 115-116, para. 55 (emphasis added).

[154] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1996, *I.C.J. Reports* 1992, pp. 261-262, para. 55.

> so entitled to act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute of the Court ...".[155]

5.7 The underlying idea of this same principle is furthermore expressed in Article 32 of the European Convention which constitutes the basis for the jurisdiction of the Court in the present case. Article 32 (1) of this Convention expresses clearly this other aspect of the *Monetary Gold* rule:

> "This Convention shall remain applicable as between the Parties thereto, even though a third State, whether a Party to the Convention or not, has an interest in the dispute".

5.8 This provision simply reproduces the text of Article 35[156] of the Geneva General Act of Arbitration (Convention on the Pacific Settlement of International Disputes) of 26 September 1928[157] and does not seem to have been the object of any discussion during the *travaux préparatoires* of the European Convention. It seems apparent from the very text of this provision that it aims at overcoming the possible objections linked with the existence of third States interests in a given case. As acknowledged by Professor Jean Salmon:

> "En ce qui concerne les intérêts d'une tierce Puissance, ils sont en principe écartés par l'article 32 de la convention qui prévoit que la convention demeure applicable entre les parties, encore qu'un État tiers partie à la convention ou non ait un intérêt dans le différend. Cependant, les intérêts sont protégés par les possibilités d'intervention".[158]

5.9 However, it is Liechtenstein's submission that it is not necessary to try to determine whether it was the intent of the drafters of the Convention to depart from the first aspect of the *Monetary Gold* principle as recalled above:[159] in any case, this provision clearly reinforces this second aspect and makes clear that the mere existence of an interest of a third State in a dispute might allow that State to intervene in the proceedings in accordance with Article 33 of the Strasbourg Convention, but it does not preclude the Court from being seized of and deciding the case even in the absence of a request to intervene from the State whose interests are or may be affected by the decision of the Court.

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[155] *Ibid.*, p. 261, para. 54.

[156] Paragraph 1 of Article 35 of the Geneva General Act reads as follows: "The present General Act shall be applicable as between the parties thereto, even though a third Power, whether a party to the Act or not, has an interest in the dispute".

[157] Geneva, 26 September 1928, 93 *League of Nations Treaty Series*, p. 343.

[158] J. Salmon, "La Convention européenne pour le règlement pacifique des différends", 63 *Revue général de droit international public* 1959, p. 50; on the argument based on the possibilities of an intervention, see also below para. 5.10.

5.10 This is confirmed by the history of the predecessor of Article 33 of the Strasbourg Convention relating to intervention of third States in a procedure before the Court, that is Article 36 of the Geneva General Act. The draft of Article 35 of the Convention on the Pacific Settlement of International Disputes adopted in first reading by the Committee of Arbitration and Security obliged any third State being a party to the Convention to accept the invitation of the Parties to join the proceedings.[160] This very unusual mechanism under international law was changed following an observation by the Registrar of the Permanent Court, who pointed to its incompatibility with the Rules of Court. The Draft Article 35 was consequently amended and a new Article 36 was introduced and aligned with Article 62 of the Statute, simply giving any third State which considers itself as having an interest of a legal nature in the dispute the option to intervene in the proceedings.[161] It thus clearly follows from those *travaux* that neither Article 35 of the Geneva General Act nor Article 32 of the Strasbourg Convention necessitates the participation of a third State having an interest in the dispute and that they do not preclude the Court from being seized of that dispute and deciding it, even in the absence of that State.

5.11 Article 32 of the European Convention, as well as the consequences of the *Monetary Gold* rule resulting from the Court's case-law - if properly analyzed - are entirely applicable to the present case. Indeed, it cannot be completely ruled out that the interests one of the successor States of Czechoslovakia or both might be "affected" by a decision of the Court in the present proceedings. However, they would certainly not be "affected" in the way Albania's interest was in the *Monetary Gold* proceedings or Indonesia's in the *East Timor* case; they are by no means the "subject matter of the dispute". Contrary to what Germany has suggested, it is not a necessary precondition to determining the responsibility of Germany for the Court to rule on any obligation or responsibility or any right owed or enjoyed by Czech Republic or Slovakia.

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[159] See above paras. 5.5 and 5.6.

[160] Journal officiel de la Société des Nations, XI, No. 5, p. 618.

[161] G. E. Gallus, "L'Acte général d'arbitrage", 190 *Revue de droit international et de législation comparée* 1930, pp. 898-899.

C. The Czech Republic (or Slovakia) is not an indispensable third party in the present case

5.12 Germany argues that Czechoslovakia, or one of its successor States, is an indispensable Party because, first, the Court would have to pass judgment on the lawfulness of the Czechoslovakian Beneš decrees[162], and second, the Court is said to have to decide on the existence *vel non* of any Czechoslovak or Czech right to reparations.[163]

5.13 Concerning the first point, the German allegations are based on a most serious distortion of Liechtenstein's case and claim. Contrary to the German assessment, a prior decision regarding the lawfulness or the unlawfulness of the Czechoslovakian measures taken in 1945 is not necessary. Liechtenstein does not seek to establish the international responsibility of Germany on the basis of recognition of an internationally wrongful act committed by a third State, i.e. Czechoslovakia. Any possible Czech or Slovak responsibility is outside and independent of the present proceedings. Consequently, it does not form the very "subject matter" of this case. The same holds true with respect of the existence *vel non* of any entitlement to reparations of these two States, the second argument put forward by Germany.

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[162] GPO, paras. 168-173.

[163] GPO, paras. 174-176.

1. The lawfulness of the Beneš decrees is not at stake and the Court does not need to decide this point

5.14 According to the Preliminary Objections:

> "The Czech Republic is an indispensable third party concerning the question of the lawfulness of the Beneš Decrees. The Court cannot decide on any claims of unlawful recognition of foreign confiscations or unjust enrichment on the part of Germany without passing judgment on the Czechoslovak seizures of Liechtenstein property".[164]

This is, of course, right and Liechtenstein fully agrees, but this abstract general point is of no relevance in the present case: the "unlawful recognition of foreign confiscations" is not at issue and Liechtenstein has not hinted at any such claim in its Application, which relates exclusively to the inclusion, *by Germany*, of Liechtenstein's assets in the reparations regime.

5.15 Germany again distorts the Liechtenstein case, even though it is very well aware of what is really at stake, i.e. the wrongful inclusion of the Liechtenstein property in the reparations regime.[165]

5.16 Moreover, Germany quotes some extracts of the Memorial in a very unusual manner, disrupting the meaning of the words and the real intention of the authors. Thus, in paragraph 170 of its Preliminary Objections, Germany makes a partial quote of paragraph 6.42[166] of the Liechtenstein Memorial:

> "The picture changed completely when Germany contended, following the Pieter-van-Laer case, that the Liechtenstein nationals' assets confiscated by Czechoslovakia had been rightly treated as German assets, as defined by the reparations regime".[167]

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[164] GPO, para. 167.

[165] See above paras. 4.6-4.9 and para. 1.7.

[166] The Preliminary Objections mistakenly refer to para. 6.41 of the Memorial (GPO, p. 105, Footnote 2).

[167] Memorial, para. 6.42.

But it omits to quote the end of this passage:

> "In other words, Germany now accepts that these properties were 'seized for the purpose of reparation or restitution, or as a result of the state of war', within the meaning of Article 3 (1) of the 1952 Settlement Convention (Annex 16)".[168]

5.17 This second sentence is necessary to correctly appreciate the meaning of the first one: Liechtenstein's claims relate exclusively to German international responsibility for acts and omissions imputable to Germany alone. Indeed, as Germany has perfectly understood, Liechtenstein complains, not of the confiscation of its assets by Czechoslovakia in 1945, but of the change of position of Germany concerning this confiscation, a change of position vis-à-vis Liechtenstein, which first occurred with the rulings of the German courts in the *Pieter van Laer* case. It is this conduct, which resulted in the inclusion of the Liechtenstein assets in the reparations regime, which amounts to a violation of several international obligations by which Germany was bound towards Liechteinstein, e.g. respect of Liechtenstein's sovereignty and neutrality and respect of Liechtenstein property as neutral property. These internationally wrongful acts have nothing to do with the wrongfulness or rightfulness of the confiscations as such by Czechoslovakia.

5.18 Another example of Germany's distortion of Liechtenstein's case can be found in paragraph 175 of the Preliminary Objections:

> "Even if, for the sake of argument, one accepted Liechtenstein's contention that Germany had somehow changed its position regarding the lawfulness of the Beneš Decrees in the 1990s …".[169]

This is not at all what Liechtenstein is claiming: the Applicant does not contend that Germany has changed its position concerning "the lawfulness of the Beneš Decrees in the 1990s"; it does contend that Germany has changed its position with regard to the inclusion of the confiscated assets into the reparations regime established particularly by the Paris Agreement of 1952.

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[168] *Ibid.*

[169] GPO, para. 175.

5.19 This inclusion has nothing to do with the lawfulness, *vel non*, of the Beneš Decrees: whether they were lawful or not, the fact is that, now and in contrast with the position it constantly maintained between 1945 and the 1990s, Germany treats the Liechtenstein property as subject to the reparations regime. It is this German position - which has only been adopted in the second part of the 1990s - which constitutes the cornerstone of this case. The lawfulness or wrongfulness of the Beneš Decrees has never been an issue and has nothing to do with the position Germany now takes. Whether the confiscation was lawful or not does not change the picture: the fact is that Liechtenstein property cannot be included in the reparations regime and that Germany now contends that it is.

5.20 In consequence, a legal assessment by the Court of the lawfulness of the Beneš Decrees is not necessary to the establishment of the responsibility of Germany. The responsibility of Germany for its inclusion of the Liechtenstein assets in the reparations regime is entirely independent of the lawfulness of the Beneš Decrees, and of a prior decision over the possible responsibility of Czechoslovakia or of the Czech and Slovak Republics: even supposing the Beneš Decrees were lawful - a fact on which Liechtenstein has not to take position in the framework of the present proceedings. Germany does not consider the Liechtenstein property as part of the reparations regime (the more so as there is no suggestion in the Beneš Decrees themselves at all that they are part of the reparations regime), or, if it does, it must assume the consequences of such a position.

5.21 Of course, the Beneš Decrees have a factual role to play in the present proceedings: they constitute the factual presupposition of the present dispute. Nevertheless, the possible Czech responsibility for the damages caused by these Decrees to Liechtenstein is not the subject of the present proceedings and does not constitute the very "subject matter" of this dispute between Germany and Liechtenstein. Germany's international responsibility does not arise because of any collaboration in an internationally wrongful act by Czechoslovakia or the Czech Republic. Its responsibility has to be determined according to the principle of "independent responsibility" referred to by the International Law Commission in its Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts:

> "The principle that State responsibility is specific to the State concerned underlies the present Articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities".[170]

5.22 The present claim is for the present purpose more like the *Corfu Channel* case[171] than any of the cases which Germany relies on. In that case, the United Kingdom sued Albania for the damages, including losses of human life, caused by the mining of two British destroyers in Albanian waters. The mines were laid by a third State, which appeared later being Yugoslavia - a State which was not a party to the dispute. Although the United Kingdom had complained of collusion between the Albanian and the Yugoslav governments, the Court did not have to decide, and did not decide, on the responsibility of Yugoslavia, but only on Albanian responsibility. The Court held Albania responsible for the violation of its own obligation - to warn the United Kingdom of the presence of mines in its waters -, but not for its recognition of, or its involvement in, an internationally wrongful act of a third State - the laying of the mines.[172] Thus, the Albanian responsibility was independent, and primarily did not derive from the wrongfulness of conduct of a third State even though, absent this conduct, there would simply have been no case.

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[170] Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), p. 150.

[171] *Corfu Channel* case, Merits, 9 April 1949, *I.C.J. Reports* 1949, p. 4.

[172] *Ibid.*, p. 22.

5.23 The context of the present case is very similar. Whether or not the seizure of the Liechtenstein property by Czechoslovakia was an internationally wrongful act, the fact is that Germany has changed its position regarding the inclusion of the confiscated assets in the reparations regime and this inclusion is precisely what Liechtenstein complains of. By this inclusion, Germany was in breach of its own international obligations. The responsibility whose recognition by the Court Liechtenstein is seeking is thus an "independent responsibility" (in the words of the ILC), and not a derived one.

5.24 Contrary to the German allegations,[173] the present case is not close to the *Monetary Gold removed from Rome in 1943* case or to the *East Timor* case where this Court would have had to establish the responsibility of an absent third State as a "necessary prerequisite".[174] It is not even comparable to the *Nauru* case where a problem of simultaneous responsibility was at stake which proved not to be of such a nature as to exclude the admissibility of that case with respect of the "indispensable third party rule" because the responsibility of the "affected" third States - New Zealand and the United Kingdom - was not the very "subject matter" of the dispute.[175] In the present case, the responsibility of Germany and the possible responsibility of Czechoslovakia, or of its successor States, are completely different issues, which are not bound by any logical link. They are neither conditioned one by the other, nor simultaneous. They are only different, based on different acts, committed at different times, with different consequences.

5.25 Furthermore, in its Preliminary Objections, Germany alleges that the question concerning the enrichment of Germany could not be decided upon without a prior determination of the lawfulness of the Czechoslovakian measures, i.e. the Beneš Decrees.[176] This argument too is erroneous. The lawfulness of the Beneš Decrees is just as indecisive for the unjust enrichment claim as it is for any other claim presented by Liechtenstein. Indeed, as Liechtenstein has shown in its Memorial,[177] the concept of unjust enrichment is independent of the existence of a wrong committed by the enriched party (or by anyone else). Relief under this principle is granted as a remedy for unfair consequences resulting from an unjustified transfer of property. It is thus a general principle of law based on equity, not on wrongfulness.

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[173] GPO, paras. 157-159.

[174] *East Timor (Portugal v. Australia)*, 30 June 1995, *I.C.J. Reports* 1995, pp. 102 and 104, paras. 28 and 33; see also *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, *I.C.J. Reports* 1992, pp. 261-262, para. 55.

[175] *Ibid.*

5.26 Moreover, the Beneš Decrees do not even constitute the act giving rise to the enrichment and the correlative impoverishment of which Liechtenstein complains. Germany, once again, misinterprets the Liechtenstein Memorial by alleging that the Czechoslovak decrees caused the impoverishment of Liechtenstein. As the Liechtenstein Memorial has clearly explained, "Germany now accepts that these properties were 'seized for the purpose of reparation or restitution, or as a result of the state of war', within the meaning of Article 3 (1) of the 1952 Settlement Convention".[178] Consequently, "[b]y acknowledging that Liechtenstein's assets are part of its debt Germany has, therefore, enriched itself since its debt has been lessened in the same proportions".[179] This would be true whether the Beneš Decrees were lawful or unlawful: the fact is that Germany seeks to enrich itself by including Liechtenstein property in the reparations regime. With regard to the unjust enrichment claim, the Beneš Decrees again constitute a mere factual background. The direct causation of Germany's enrichment has to be found in its own acts, i.e., the change of position described at length in the Memorial. As Liechtenstein has highlighted:

> "... the direct causation of Germany's enrichment lies in its own behaviour and the confiscation of the assets in 1945 is a mere fact in this respect, the qualification of which as legal or not does not matter".[180]

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[176] GPO, para. 169.

[177] Memorial, para. 6.8.

[178] Memorial, para. 6.42.

[179] Memorial, para. 6.44.

[180] Memorial, para. 6.47.

5.27 Therefore, it appears that, with respect to unjust enrichment too, the circumstances of the present case are entirely different from those of the *Monetary Gold* case. In that case, the Court declined to admit the claims on the ground that a decision on the rights of Italy would have required a legal assessment of the Albanian responsibility without the consent of Albania.[181] By contrast, in the present case and so far as the unjust enrichment claim is concerned, the responsibility of Czechoslovakia, or of one of its successors, is entirely irrelevant: the unlawful enrichment of Germany stems from its own new position and has nothing to do with the Czechoslovak acts.

5.28 All these elements show that the Fifth German Preliminary Objection has to be rejected as unfounded in regard of the question of lawfulness of the Beneš Decrees. A legal assessment of this question is not a necessary prerequisite for the decision of the Court in the present case. It is not the very subject matter of the dispute and it is not even clear how the Czech (or Slovak) interests could be "affected" by the Court's decision in this respect.

2. The existence of a Czechoslovakian right to reparations has no relevance with regard to the unjust enrichment claim

5.29 The second German argument put forward in support of a "*Monetary Gold* situation" in the present case concerns the existence *vel non* of a Czechoslovak, or Czech or Slovak, right to reparations from Germany. According to Germany's allegations, the mere existence of this right must be decided before the Court could possibly address the unjust enrichment claim.[182] It is then apparent that, according to the German argument itself, a decision would have to be taken concerning the *rights* - not the *obligations* as was the case in the *Monetary Gold* case - of an absent, third State. However, Germany contends that such a situation would equally fall under the "Indispensable Third Party Rule".[183]

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[181] *Monetary Gold Removed from Rome in 1943*, 15 June 1954, *I.C.J. Reports* 1954, p. 19.

[182] GPO, para. 167 (point (2)).

5.30 In this respect, Liechtenstein maintains that there is no point in determining whether the Court could, or not, pronounce on the *rights* of third States (even though it does not clearly see why it could not). In any case, the Applicant cannot share the view of Germany that …

> "the Court could not decide on any compensation due for unlawful seizure of Liechtenstein property by Czechoslovakia without first determining the legal relationships between Germany and a third sovereign State, namely the Czech Republic".[184]

5.31 Once again, Germany deliberately misreads Liechtenstein's Application and its elaboration in the Memorial, so that the initial claim is interpreted as a mere expropriation claim by Liechtenstein directed towards the wrong defendant. As already shown,[185] the present proceedings do not entail the responsibility of Czechoslovakia or one of its successor States for any wrongful seizure of property. It concerns exclusively German acts, i.e. the change of position of Germany with respect of the Liechtenstein property, now included under the reparations regime *by Germany itself.*

5.32 By doing so, *Germany* itself assumes that it owes reparations to the Czech Republic. Undeniably Germany applied Article 3 (3) of Chapter Six of the Settlement Convention to the Liechtenstein property in the *Pieter van Laer* case. This bears witness of its conviction that the Czechoslovakian measures concerning the Liechtenstein assets fell under the provisions of paragraph 1 of this same Article and were therefore "measures which have been … carried out with respect to German external assets or other property, *seized for the purpose of reparation or restitution*". The Court has nothing to decide in this respect. Suffice it to take Germany at its own words.

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[183] GPO, paras. 174-175.

[184] GPO, para. 174.

[185] See above paras. 5.15-5.17.

5.33 Any other position taken by Germany before the Court would be contrary to the general principle of international law known as *allegans contraria non est audiendus*.[186] As Cheng put it, this principle is

> "yet another instance of the protection which law accords to the faith and confidence that a party may reasonably place in another, which … constitutes one of the most important aspects of the principle of good faith.".[187]

Decisions of international tribunals have recognized and applied this principle in a particularly consistent way. In the *Eastern Greenland* case, the Permanent Court held that:

> "Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland."[188]

Similarly, in the case concerning the *Arbitral Award made by the King of Spain on 23 December 1906* between Honduras and Nicaragua this Court affirmed:

> "In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to challenge the validity of the Award".[189]

Particularly close to the present proceedings is the case of the *S.S. "Lisman"* decided by arbitration between the United States and the United Kingdom.[190] The sole Arbitrator refused to consider an allegation of the Claimant which was in substance contrary to its previous contentions in another proceeding:

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[186] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, Stevens, London, 1953, pp. 141 *et seq*.

[187] *Ibid.*, p. 144. See also R. Kolb, "La bonne foi en droit international public", 31 *Revue belge de droit international*, 1998-2, p. 685.

[188] *Legal Status of Eastern Greenland*, 5 April 1933, 1933 PCIJ, Ser. A/B, No. 53, p. 68-9.

[189] *Arbitral Award made by the King of Spain on 23 December 1906*, 18 November 1960, *I.C.J. Reports* 1960, pp. 192 *et seq.*, p. 213.

[190] *UNRIAA*, Vol. III, pp. 1767 *et.seq.*, p. 1779.

> "by the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful, and that he did not complain of them, but only of undue delay from the failure of the Government to act promptly, claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on, that these acts were unlawful, and constitute the basis of his claim".[191]

The Iran-United States Claims Tribunal also confirmed this principle when it applied the

> "general rule of evidence that contradictory statements of an interested party should be construed against that party".[192]

If follows therefrom that Germany cannot reasonably defend the lawfulness of the application of the Settlement Convention to the Liechtenstein property and, at the same time, sustain the absence of any legal obligation of Germany to compensate war damages to Czechoslovakia or its successor states. However, the Court has not to decide that point either.

5.34 Whether Germany owes reparations to the Czech Republic (and to Slovakia) has no relevance in the present case. The fact is:

- that Germany assumes that it owes reparations to those States;
- that it includes the Liechtenstein assets in the reparations; and

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[191] *Ibid.*, p. 1790.

[192] Iran-United States Claims Tribunal, Award No. 73-67-3, 2 September 1983, *Woodward-Clyde Consultants v. The Government of the Islamic Republic of Iran and the Atomic Energy Organization of Iran*, 3 *Iran-United States Claims Tribunal Reports* 239, 1983-II, p. 249.

- that this inclusion has, in itself, a negative impact on Liechtenstein and its citizens since, as shown in the Memorial,[193] the mere fact of including the Liechtenstein assets in the reparations regime deprives them of any possibility to claim any compensation.

5.35 The *Pieter van Laer* case has been both the catalyst and a clear illustration of this situation: the German courts have decided that the painting was subject to the reparations regime; *as a consequence* of this inclusion, they deemed themselves incompetent to decide on the case brought by the Prince of Liechtenstein. Whether or not reparations are due by Germany to the Czech and Slovak Republics is an entirely different matter which only concerns the relations between them; the fact is that in its relations with Liechtenstein Germany has applied this regime with all the negative consequences this application entails (impossibility to sue in a German court and, now, to obtain compensation). With the endorsement of the findings of the courts by the German Government, this now applies to all the Liechtenstein assets confiscated in 1945.

5.36 It follows that Germany's allegations concerning a necessary determination of "hypothetical claims of reparations between the Czech Republic"[194] and itself are no better established than its contention concerning the [un]lawfulness of seizure of Liechtenstein property: in both cases, the elements on which Germany bases its assertions may have a factual incidence on the present case, but it is not for this Court to pass a judgement on them:

- the Liechtenstein assets were confiscated by Czechoslovakia; this is a fact; but, irrespective of whether this was lawful or not, Germany draws conclusions from this fact and only those consequences are before the Court;

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[193] For a summary, see, e.g., Memorial, para. 6.73.

[194] GPO, para. 175.

- Germany has included the Liechtenstein assets in the reparations regime; this too is a fact; but, again, whether or not Germany is liable to pay reparations to Czechoslovakia or its successors is not the question before this Court. This Court is only called upon to draw the legal consequences of this fact in relations between Liechtenstein and Germany.

5.37 Germany asks:

> "If no reparations are due, why should Germany be enriched by an alleged change of position in 1995?".[195]

The answer is given by Germany itself: *it* considers that it is liable for reparations and, consequently, it has included the Liechtenstein assets in the reparations regime. It is entirely incompatible with the principle of good faith for Germany now to assert the contrary in order to enable it to draw conclusions which are adverse to Liechtenstein in this respect, and it is therefore estopped from doing so. This is however, clearly an issue for the merits stage of the proceedings. The question of the use of this property effectively to satisfy the claims of Czechoslovakia is not at issue in the present case: whether or not Germany is liable for reparations to the Czech (or the Slovak) Republic, Germany now behaves as if it were so liable and the consequences of this position (whether it is right or not) are detrimental to Liechtenstein and its citizens. However, this is also an issue of the merits only.

5.38 It follows from all these arguments that no right or obligation of Czechoslovakia or any other third State forms the "very subject matter" of this case. Therefore, the *Monetary Gold* principle is not applicable and the Court should determine the dispute.[196] The mere fact that a legal interest of a third State might be "affected" does not change the picture. In this situation the third State is entirely protected by Article 59 of the Statute of the Court:

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[195] *Ibid.*

[196] See above paras. 5.6-5.9.

> "The decision of the Court has no binding force except between the parties and in respect of that particular case".

5.39 In conclusion,

(i) A decision on the lawfulness of the Czechoslovak Beneš Decrees is not a prerequisite to a decision on the international responsibility of Germany or the unjust enrichment claim, and that question does not constitute the very subject matter of the dispute;

(ii) A decision on the existence *vel non* of the right of Czechoslovakia or the Czech or Slovak Republics to receive reparations from Germany is not necessary in order to determine the unjust enrichment claim;

(iii) Consequently, the Czech (or Slovak) Republic, as a successor State of Czechoslovakia, is not an "Indispensable Third Party";

(iv) No consent of a third State is needed for the decision on the present dispute. The present dispute can be decided in the absence of consent of this third State.

5.40 For all these reasons, the Principality of Liechtenstein requests the Court to reject the Fifth Preliminary Objection of Germany.

CHAPTER 6

GERMANY'S ARGUMENT BASED ON THE LOCAL REMEDIES RULE

A. Introduction

6.1 In Part III, Section III of its Preliminary Objections, Germany argues that Liechtenstein's action is inadmissible because it is pursued in the exercise of diplomatic protection and Liechtenstein nationals have failed to exhaust local remedies. But, Germany itself concedes that no exhaustion of local remedies in Germany was required and, further, that no such local remedies were available. For this reason alone, Germany's Sixth Preliminary Objection must be rejected. Nevertheless, for the sake of completeness, Liechtenstein will demonstrate in this section that the local remedies rule was fully complied with to the extent that it is applicable to the present case.

6.2 It will further be explained that, insofar as the present claim is made in respect of injuries suffered by the State of Liechtenstein itself, the rule of local remedies does not apply.

B. The Liechtenstein nationals have, in effect, complied with the local remedies rule

6.3 In its Memorial, Germany discusses at length the problem of exhaustion of local remedies, claiming that Liechtenstein nationals have failed to exhaust available local remedies, as follows from the wording of the title of Section III.[197]

6.4 Within that section itself, however, Germany makes a statement which is entirely incompatible with other parts of the same section, namely

> "that, although in principle the case must be classified as exercise of diplomatic protection, the requirement of the exhaustion of local remedies does not apply."[198]

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[197] GPO, paras. 181-208.

[198] GPO, para. 194.

This statement not only excludes any further possibility of invoking the rule of exhaustion of local remedies, but also totally obfuscates Germany's discussion of the exhaustion of local remedies in its Preliminary Objections, making it difficult to discern whether or not Germany conceives Liechtenstein's claims as addressing direct injury or as being one in exercise of diplomatic protection. In any case, this statement that the requirement of the exhaustion of local remedies does not apply in itself precludes Germany from invoking a failure to exhaust local remedies as a means of denying the admissibility of Liechtenstein's claims.

6.5 Nevertheless, insofar as the rule on exhaustion of local remedies is applicable to the present claim, there is no ground for denying the admissibility of the claim before this Court. The rule of exhaustion of local remedies requires that before a State can bring a claim against another State either by diplomatic means or before an international tribunal, the individual on whose behalf the claims are brought must have resorted to the national courts of the Defendant State. The idea behind this principle - as Germany stated quite rightly[199] - is to allow the State to bring its conduct towards that individual into conformity with what is required by international law.

6.6 Germany quite correctly pointed out that, as far as the Pieter van Laer painting is concerned:

> "It is clear, therefore, that in the painting dispute local remedies, which include also the application under the European Convention on Human Rights, have indeed been exhausted."[200]

Irrespective of whether or not the ECHR represents a form of local remedy the exhaustion of which is required, this statement of Germany removes any doubt that this condition has been fulfilled and that Germany itself has recognized this fulfillment. That there does not exist any other judicial means in Germany which could be resorted to in order to appeal against the final judgment is confirmed also by the statement in the judgment of the Federal Constitutional Court itself that its decision was unappealable.[201] Germany itself asserted that

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[199] GPO, para. 196.

[200] GPO, para. 190.

> "decisions of the Federal Constitutional Court cannot be challenged any more within the German legal system".[202]

This legal consequence was confirmed in the proceedings before the ECHR in the *Prince Hans-Adam II of Liechtenstein* case since Germany did not plead any point concerning exhaustion of local remedies, even though Article 26 of the European Convention makes the admissibility of any complaint dependent on this condition having been fulfilled. The ECHR saw no need to deal with this matter when, in its admissibility decision of 6 June 2000, it declared the complaint brought by the Reigning Prince Hans-Adam II to be admissible.[203] It can be inferred from this decision that, even in the view of the ECHR, the condition was met, so that one cannot speak of the failure to exhaust the local remedies. In this regard, the title which Germany has used for Section III is incorrect and misleading.

1. In the present case, the exhaustion of local remedies is not required

6.7 To the extent that this case is one of diplomatic protection to which the rule of the exhaustion of local remedies applies, Germany's further statements concerning the assets other than the Pieter van Laer painting are equally perplexing. On the one hand, the title used for Section III suggest that local remedies have not been exhausted by Liechtenstein nationals, which means that (in Germany's view) available and efficient local judicial remedies still exist in Germany, of which Liechtenstein nationals must take advantage. Germany's further reference to the absence of any litigation by the other Liechtenstein nationals before German courts concerning their assets seized under the Beneš Decrees points in the same direction. On the other hand, however, it clearly denies the existence of such local legal remedies:

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[201] Memorial, Annex 32.

[202] GPO, para. 191.

[203] ECHR, *Prince Hans-Adam II of Liechtenstein against Germany*, Application No. 42527/98, Decision of 6 June 2000.

> "Notwithstanding the inference already drawn that the requirement of exhaustion of local remedies applies to the facts submitted to the Court by Liechtenstein, Germany has great difficulties in specifying what legal remedies the alleged victims should have taken."[204]

6.8 Germany's statements regarding the lack of available legal remedies are the more decisive, as the burden lies upon Germany to prove the existence of legal remedies which remain to be exhausted. In such a case, according to the arbitral award in the *Ambatielos* case, the burden of proof is on the Defendant State to prove that there still are effective remedies available which have not been exhausted:

> "In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of international law, of remedies which have not been used. The view expressed by writers and in judicial precedents, however, coincides in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule."[205]

The judgment of this Court in the *ELSI* case,[206] as well as other judicial decisions,[207] confirm this view so that it is to be considered as generally accepted. In view of the burden imposed on Germany to prove the existence of further local remedies, Germany's assertion that relevant local remedies are non-existent bars it from any further contention that Liechtenstein is precluded from presenting its claim because of lack of exhaustion of local remedies.

6.9 In this context, it must be emphasised that, in its Preliminary Objections, Germany contradicts itself since, on the one hand, it states that no German court would have competence, while, on the other hand, it argues that no other case has been brought before such a court.[208] It is precisely because no German court would grant jurisdiction and decide the case on the merits, as Germany itself asserts, that no other cases were brought before German courts.

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[204] GPO, para. 191.

[205] GPO, para. 197.

[206] Case concerning *Elettronica Sicula S.p.A.* (*ELSI*), *I.C.J. Reports* 1989, para. 63.

[207] So, for instance, *Ambatielos* claim (1956), *UNRIAA*, Vol. XII, pp. 83 *et seq.*, p. 119.

6.10 As there are no legal remedies available, there is no duty to exhaust local remedies before Liechtenstein can exercise its right of diplomatic protection. This consequence is in full conformity with the limitations to the principle of the exhaustion of local remedies, since there "is no need to exhaust local remedies when such remedies are ineffective or the exercise of exhausting such remedies would be futile".[209]

6.11 This limitation on the principle that local remedies must be exhausted is generally accepted, as is confirmed by a brief review of international judicial practice such as *Panevezys-Saldutiskis Railway* case,[210] the *Arbitration under Article 181 of the Treaty of Neuilly*[211] or, before the ECHR, the case *Akdivar v. Turkey*[212] or the case *Englert v. Germany*.[213] According to judicial decisions,[214] legal doctrine,[215] and well established State practice[216] there is no necessity to exhaust local remedies when such remedies are ineffective or the exercise of exhausting such remedies would be futile.

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[208] GPO, para 193.

[209] E. M. Borchard, *The Diplomatic Protection of Citizens Abroad*, 1915, p. 821; *Ambatielos Claim (Greece v. UK)*, 6 March 1956, 3 *United Nations Reports of International Arbitral Awards* 119; *De Wilde, Ooms and Versyp*, 18 June 1971, ECHR, 14 *Yearbook of the European Convention on Human Rights* 806; Harvard Draft Articles on State Responsibility, Art. 19 (2), 55 *American Journal of International Law*, 1961, p,. 577; I. Brownlie, *Principles of Public International Law*, 5th ed., 1998, pp 499-500.

[210] 1939 PCIJ, Ser. A/B, No. 76, pp. 4 *et seq.*, p. 1.

[211] *Arbitration under Article 181 of the Treaty of Neuilly*, reported in 28 *American Journal of International Law*, 1934, pp. 760 *et seq.*, p. 789.

[212] *Akdivar and others v. Turkey*, 16 September 1996, Case No. 99/1995/605/693, para. 67.

[213] *Englert v. Germany*, 25 August 1987, Case No. 9/1986/107/155, para. 32.

[214] In his third report on Diplomatic Protection, UN Doc. A/CN.4/523, p. 7, Special Rapporteur J. Dugard quotes in support of this view: *Robert E. Brown* claim, 6 *United Nations Reports of International Arbitral Awards*, 1923, pp. 120 *et seq.*, p. 129; *Finnish Ships Arbitration*, 3 *United Nations Reports of International Arbitral Awards*, 1934, pp. 1479 *et seq.*, p. 1497, *Panevezys-Saldutiskis Railway* case, 1939 PCIJ, Ser. A/B, No. 76, pp. 4 *et seq.*, p. 19; *Ambatielos* claim, 12 *United Nations Reports of International Arbitral Awards*, 1956, pp. 83 *et seq.*, pp. 122-123; *Interhandel* case, 21 November 1959, *I.C.J. Reports* 1959, pp. 27-29.

[215] Dugard in his third report (*supra* note 214, at p. 14) refers to E. M. Borchard, *The Diplomatic Protection of Citizens Abroad*, 1915, p. 823; R. Jennings and A. Watts (eds.), *Oppenheim's International*

6.12 Futility in the context of the obligation to exhaustion local remedies exists in particular when, for instance, "there is no justice to exhaust".[217] Germany itself admitted the non-existence of available local legal remedies by its assertion that it had "great difficulties in specifying what legal remedies the alleged victims should have taken".[218] It can be deduced from this assertion that Germany does not provide for any further available judicial means to redress the unlawful situation produced by its conduct. This statement also reveals that it is not because of ignorance or incorrect legal advice, but because of the lack of local remedies in Germany, that Liechtenstein nationals cannot exhaust local remedies.

6.13 Germany also justifies the non-existence of further available measures on the lack of competence of German courts to rule on ownership of real estate situated outside Germany. However, the German argument that "only the local judiciary is competent to rule on issues connected with the ownership of real estate"[219] is not relevant in the present case. The decisions of German courts, as well as subsequent statements of German officials, in which the German conduct complained of is manifested, did not

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Law, 9th ed., 1992, p. 525; I. Brownlie, *Principles of Public International Law*, 5th ed., 1998, p. 500; C. F. Amerasinghe, *Local Remedies in International Law*, 1990, pp. 197 *et seq.*; C. F. Amerasinghe, "Whither the Local Remedies Rule?", 1990, 5 *I.C.S.I.D. Review*, pp. 292 *et seq.*, p. 306; E. Jiménez de Aréchaga, "International Responsibility", in M. Sørensen (ed.), *Manual of Public International Law*, 1968, pp. 531 *et seq.*, pp. 587-588; Verzijl, in 46 *Annuaire de l'Institut de Droit International*, 1956, p. 266; A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed., 1984, p. 883; C.H.P. Law, *The Local Remedies Rule in International Law*, 1961, p. 69; G. Schwarzenberger, *International Law*, 3rd ed., 1957, Vol. 1, p. 608.

[216] Third Restatement of the Law of the Foreign Relations Law of the United States, 1989, Part II, para. 713, cmt. (f) at p. 219; C. Warbrick, "Protection of Nationals Abroad: Current Legal Problems and codifications of the local remedies rule", 37 *International & Comparativ Law Quarterly* 1988, pp. 1002 *et seq.*, p. 1008. F. V. García Amador, Sixth report, Yearbook of the International Law Commission 1961, Vol. II, p. 48, UN Doc. A/CN.4/134 and Add. 1, Articles 18 (2) and 3 (2).

[217] Third report on Diplomatic Protection, *supra* note 214, at p. 13.

[218] GPO, para. 191.

[219] GPO, para. 193.

deny German jurisdiction on the basis of Article 23 of the German Code of civil procedure, which refers to the local judiciary. This conduct denied the competence of German courts by reference to Article 3 of Chapter Six of the Settlement Convention. It is the denial of German jurisdiction on this ground that prompted Liechtenstein to apply to this Court. In any event, in the present case, Article 23 would not be sufficient to deny German jurisdiction, since property other than immovable property is similarly affected by the German position.

6.14 Even if there were any local remedies available, any recourse to them by Liechtenstein nationals would be futile, since no Liechtenstein national who applied to a German court would obtain a decision different from that of the Federal Constitutional Court in the Pieter van Laer case. The latter decision not only excluded the possibility of any further relief by German courts in the *Pieter van Laer* case itself, but has provided a binding precedent for any other proceedings requiring a decision by any German court relating to Liechtenstein property seized under the Beneš Decrees.

6.15 The rule that there is no obligation to resort to domestic remedies if a different decision could not be expected has met with overwhelming recognition in international judicial practice, as well as in international authorities.[220] Accordingly,

> "it is not necessary again to resort to municipal courts if the results must be a repetition of a decision already given".[221]

6.16 In its Preliminary Objections, Germany itself applied this rule to this case:

> "It is true that if a dispute concerning the land owned formerly owned by Liechtenstein citizens ever came before a German court that court would have to decline jurisdiction to rule on the merits of the case."[222]

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[220] Third report on Diplomatic Protection, UN Doc. A/CN.4/523, p. 16.

[221] *Panevezys-Saldutiskis Railway* case, 1939 PCIJ, Ser. A/B, No. 76, pp. 4 *et seq.*, p. 18.

[222] GPO, para. 129.

6.17 This assertion convincingly proves that any German court would follow the decision of the Federal Constitutional Court, with the result that any further attempt by Liechtenstein citizens to obtain redress in a German court would be bound to fail. Under such circumstances, any resort to German courts must be judged to be futile and unreasonable, so that there can be no obligation for individual citizens to resort to German courts before Liechtenstein could espouse these claims on their behalf. The decision of the Federal Constitutional Court not only excluded the granting of any further relief by Germany, but precluded any other conclusion in proceedings before any German court on the status of Liechtenstein property seized under the Beneš Decrees.

6.18 For all these reasons, a failure to exhaust local remedies can under no circumstances be invoked by Germany as a bar to the admissibility of Liechtenstein's claims.

2. Germany's reference to local remedies in Czechoslovakia

6.19 Germany surprisingly further contends

> "that the Liechtenstein victims of the Czechoslovak confiscation policy should have contested before the courts of the former Czechoslovakia the confiscation measures taken to their detriment. They should at least have attempted to avert the losses which Czechoslovakia inflicted upon them by depriving them of their possessions. In fact, the Czechoslovak measures were the proximate cause of the damage which constitutes the heart of the present dispute. Liechtenstein itself confines itself to contending that Germany brought into being a second cause, a remote cause, for that damage."[223]

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[223] GPO, para. 195.

Although it agrees that

> "[t]he requirement of the exhaustion of local remedies is designed to provide the alleged wrong-doing State with an opportunity to make good any incorrect action it may have taken"[224]

it nevertheless requires Liechtenstein citizens to have resorted first to judicial devices in former Czechoslovakia before Liechtenstein could exercise diplomatic protection against Germany.

6.20 The central point is a simple one. Lack of exhaustion of the Czechoslovakian or, after the demise of this State, the Czech and Slovak legal remedies can never serve as a bar to a claim against Germany. It is Germany which is the only defendant party in this dispute. The activities relevant for the present case are those which constitute Germany's position taken in the 1990s. It must be recalled that it was Germany that declared Liechtenstein property to be among the assets subject to reparation measures. It was Germany that declared Liechtenstein property to be German property against which reparation measures within the meaning of the Settlement Convention could be taken. Only Germany can make good its own incorrect acts and, thereby, achieve the objective of the rule of exhaustion of local remedies if such remedies were available; neither former Czechoslovakia nor any of its successor States could achieve such a result.

6.21 Germany's view is also incorrect in that it identifies the measures under the Beneš Decrees as the centerpiece of the claims:

> "The interference which matters in fact is the strategy of confiscation pursued by Czechoslovakia in 1945-46. Even according to Liechtenstein's pleadings, Germany is at most second in the chain of events, or rather the third actor, inasmuch as the stipulation in Article 3, paragraph 3, of Chapter Six of the Settlement Convention goes back to a specific demand of the Three Western Powers which made the abolition of the occupation regime dependent on Germany's consent to a clause which

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[224] GPO, para. 196.

> would make all the measures taken with a view to enforcing reparations or restitution immune from scrutiny by German courts." [225]

6.22 In fact, this view confuses the historical background to the claims with the events which are legally significant in the present case. What is significant in legal terms is not the measures under the Beneš Decrees themselves, but the inclusion of Liechtenstein property that had been subject to the Beneš decrees into the reparations regime.

6.23 Germany argues that it is only because of the failure of the Liechtenstein nationals to resort to local remedies in Czechoslovakia that Liechtenstein is bringing the present action against Germany:

> "In this special and absolutely extraordinary configuration the last actor in a chain of three cannot be denied the benefit of invoking the failure of the Claimant's nationals to contest the primary cause of the calamity that befell them, namely the Czechoslovak measures of confiscation."[226]

This argument, however, again combines two different causes of action which must necessarily be distinguished: the first is the measures taken against Liechtenstein property under the Beneš Decrees, which, however, is not the subject matter of the present claim; the other is the wrongful inclusion of Liechtenstein property into the reparations regime within the meaning of the Settlement Convention. The present claim is confined to the latter issue only and no resort to legal remedies in Czech Republic or Slovak Republic (as successor of the former Czechoslovakia) could remedy the German wrongful acts.

6.24 In the conclusions of its Preliminary Objections, Germany refers again to this issue:

> "Should the Court not share the view that the non-exhaustion of local remedies in Czechoslovakia and the Czech Republic qualifies as a preliminary objection that can be raised by Germany, Germany would develop the argument more fully in its written pleadings on the merits - in

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[225] GPO, para. 197.

[226] GPO, para. 197.

> case the dispute should ever reach that stage. In any event, that failure would have to be taken into account as contributory negligence. If the victims abstained from fighting for their rights in the appropriate fora, they cannot expect that the losses confirmed by their passivity will be assumed by a third party which neither had any duty of diligence with regard to the property concerned, nor had the power to stop the unlawful actions committed by the Czechoslovak Government."[227]

6.25 These conclusions again reveal a deliberate misunderstanding of the true cause of action. In its claim against Germany, Liechtenstein is not asking for a remedy in relation to the measures taken under the Beneš Decrees, but for a remedy for the appropriation by Germany of Liechtenstein property for the purposes of Germany's reparations as a consequence of the World War II, irrespective of any legal assessment of the Beneš Decrees. This German argument as to failure to have recourse to Czech or Slovak legal remedies (as the case may be) has no bearing on this dispute, which is a dispute between Liechtenstein and Germany exclusively and in which Liechtenstein is invoking Germany's sole responsibility. Germany's argument amounts merely to a further attempt to distort the real nature Liechtenstein's claim and to present it in a form in which Liechtenstein has never cast it.

C. The local remedies rule is not applicable in that the claim submitted by Liechtenstein is a claim for direct injury

6.26 It is generally accepted that the application of the local remedies rule is restricted to cases of diplomatic protection, i.e. to cases where a State has inflicted injury to aliens on its territory. In contrast, the rule is not applicable to cases where a State is violated in its direct, State to State rights. This principle was endorsed by the Court in the *Interhandel*[228] and *ELSI*[229] cases and is unanimously accepted in international judicial and arbitral practice[230] as well as in doctrine.[231]

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[227] GPO, para. 208.

[228] *Interhandel* case, 21 November 1959, *I.C.J. Reports* 1959, p. 28.

[229] Case concerning *Elettronica Sicula S.p.A. (ELSI)*, *I.C.J. Reports* 1989, para. 52.

[230] *The M/V "Saiga" (No. 2) Case*; ITLOS 1997, reprinted in 38 *International Legal Materials* 1999, p. 1323, para. 98; *Air Service Agreement* Arbitration, 1978, 18 *United Nations Reports of Interna-*

6.27 Direct injury affects the State in its status as an independent personality and in its quality as a sovereign entity in international law. In cases of direct injury, it is State prerogatives that are at stake. Examples of direct injury are violations of the territorial sovereignty or, more generally, the territorial rights of a State, damage to State property, or violations of the rules arising from diplomatic and consular law.[232]

6.28 Two forms of direct injury are of particular importance for the present case. The first are violations of the law of neutrality.[233] Neutrality defines the legal status and the legal capacity of the (neutral) State in relation to other States in time of war[234] and therefore directly concerns its legal personality in the international legal order. In this "status-related" sense, a breach of neutrality is comparable to a violation of sovereignty. A violation of the law of neutrality necessarily affects the neutral State in its status and quality as an international legal person and therefore amounts to *direct* injury to the neutral State, even if nationals of the neutral State are also prejudiced. When e.g. Germany violated Swiss neutrality in World War I, causing personal injury and material damage to Swiss nationals, the latter were not required to exhaust local remedies in Germany as a condition precedent to Switzerland being able to bring a claim against Germany.[235]

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tional Arbitral Awards, p. 431, para. 30; *Case Concerning the Heathrow Airport User Charges*, 102 *International Law Reports* 1992, p. 279.

[231] T. Meron, "The Incidence of the Rule of Exhaustion of Local Remedies", 35 *British Yearbook of International Law*, 1959, pp. 84-88; C. F. Amerasinghe, *Local Remedies in International Law*, 1990, pp. 108-132; Dugard, *Second report on diplomatic protection*, UN Doc. A/CN.4/514, paras. 21-23; S. Wittich,"Direct Injury and the Incidence of the Local Remedies Rule", 5 *Austrian Review of International and European Law* 2000, p. 121.

[232] See, e.g., Greig, *International Law*, 1970, pp. 399-402; Chappez, *La règle de l'epuisement des voies de recours internes*, 1972, pp. 36-42.

[233] I. Brownlie, *System of the Law of Nations. State Responsibility*, Part I, 1983, p. 238.

[234] K. Hailbronner, "Der Staat und der Einzelne als Völkerrechtssubjekt", in W. Graf Vitzthum (ed.), *Völkerrecht*, 2nd ed., 2001, pp. 212-213, where a declaration of neutrality is considered as an exercise of sovereign jurisdiction.

[235] *Répertoire suisse de Droit international*, Vol. III, 1975, pp. 1773-1775, para. 8.52.

6.29 The second form of direct injury invoked by Liechtenstein is the breach of Liechtenstein's sovereignty by Germany. It is generally acknowledged that direct injury is caused when a State transgresses the "limits of national jurisdiction under the general rules of international law" to the detriment of another State.[236] In the present case, Germany treats Liechtenstein nationals as German nationals *pro tanto* to their detriment. By so doing, Germany has violated the personal jurisdiction and authority of Liechtenstein over its, i.e., Liechtenstein's, own nationals.

6.30 Many international disputes contain elements of both diplomatic protection and direct injury, and the present case is of such a "mixed nature", which ensues from the concurrence of different rules of international law breached by one and the same conduct. Liechtenstein further agrees with Germany that, in mixed cases, the various elements of a dispute have to be scrutinised in order to determine whether the direct or the indirect injury element is preponderant.[237] However, Liechtenstein rejects Germany's application of this test to the present case. In particular, Germany maintains that "the case contains no single element outside the property issue which might give it a tinge that would remove it from the area of diplomatic protection".[238] In other words, Germany argues that Liechtenstein's claim only addresses indirect injury and is exclusively concerned with diplomatic protection. Yet, if there is not a single element of direct injury, it might be asked why Germany applies the preponderance test at all.

6.31 Apart from this contradiction in Germany's reasoning, Germany ignores Liechtenstein's arguments with regard to sovereignty and, in particular, neutrality. With regard to the applicability of the local remedies rule, Germany does not establish that Liechtenstein's claim arising out of Germany's breach of its duty to respect the neutrality of Liechtenstein and of Liechtenstein nationals is not a direct claim which renders the local remedies rule inapplicable. The reason for Germany's silence in this respect is obvious: There is no doubt that any violation of the laws of neutrality constitutes a *direct injury* of the neutral State, i.e., Liechtenstein, and gives rise to a *direct claim* of Liechtenstein against Germany.

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[236] W. Riphagen, Second report on the content, forms and degrees of international responsibility, *Yearbook of the ILC* 1981, Vol. II, Part One, p. 91.

[237] This "preponderance test", initially developed by Meron, was incorporated by ILC's Special Rapporteur on diplomatic protection into his second report on diplomatic protection, UN Doc. A/CN.4/514, paras. 21 and 23 and Draft Article 11.

[238] GPO, para. 188.

6.32 Germany refers to the *ELSI* and the *Interhandel* cases and argues that these two cases were similar to the present one.[239] However, Liechtenstein submits that, contrary to Germany's submission, the present case substantially differs from these two cases. In the *Interhandel* case, Switzerland requested the Court to declare that the United States was under an obligation to restore the assets of Interhandel, a Swiss company. The assets in question consisted of 90 per cent of the shares in a United States company which were owned by Interhandel and which had been confiscated by the United States Government under the Trading with the Enemy Act on the grounds that Interhandel belonged, or was at least controlled by, the German company IG Farbenindustrie. Switzerland was only requesting the restitution of assets of a Swiss company and thus merely securing the interest of one of its nationals.[240] Even the alternative Swiss claim (as regards the obligation of the United States to submit the dispute to arbitration or conciliation) was exclusively directed to securing the restoration of the assets of the Swiss company.[241] Therefore, the Court concluded that "one interest, and one alone, that of Interhandel" was the basis for the Swiss claim.[242] In other words, the *only* interest Switzerland had in instituting proceedings before the International Court was the restoration of property rights to a Swiss company; there was no additional element in the Swiss claim which pointed to direct injury suffered by Switzerland in its status as an international legal person. Although Switzerland invoked an obligation of the United States under an international treaty,[243] this did not suffice in itself to establish direct injury, and there was no other basis to establish direct injury.

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[239] GPO, paras. 185-186.

[240] *Interhandel* case, 21 November 1959, *I.C.J. Reports* 1959, pp. 28-29.

[241] *Interhandel* case, 21 November 1959, *I.C.J. Reports* 1959, p. 29. Switzerland itself was of the opinion that this alternative submission did not differ in substance from its principal submission and thus was only concerned with the property rights of the Swiss company, see *Interhandel* case, *I.C.J. Pleadings* 1959, p. 406.

[242] *Interhandel* case, 21 November 1959, *I.C.J. Reports* 1959, p. 29.

6.33 Likewise, in the *ELSI* case, the United States claimed that Italy had violated its international obligations with regard to foreign companies, which is clearly a claim in exercise of the right to diplomatic protection. The United States further argued that its claim was "based exclusively on the violations of a treaty", viz., the bilateral Treaty of Friendship, Commerce and Navigation (FCN). The United States went on to argue that the "case was occasioned by damage to particular United States nationals, but the claim before this Court is an assertion of broader rights and interests of the United States under the Treaty".[244] Like Switzerland in the *Interhandel* case, the United States in the *ELSI* case only adopted the cause of its nationals whose property rights were allegedly violated by Italy in breach of the bilateral treaty. Despite the United States argument, there were no "broader rights and interests of the United States" at stake. Consequently, the Chamber of this Court held that it was impossible in that case "to find a dispute over alleged violations of the FCN Treaty resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect [of the two companies]".[245]

6.34 Both these cases have to be distinguished from the present dispute. Liechtenstein claims in the first place that Germany violated its international obligations towards Liechtenstein arising from the laws of neutrality and from the inherent right to sovereignty. Germany in its Preliminary Objections ignores this fact. It argues that "[a]s can be seen from the requests formulated in the Application, Liechtenstein is primarily interested in obtaining financial compensation for the losses its nationals suffered".[246] In the section of its Preliminary Objections dealing with the exhaustion of local remedies, Germany does not mention Liechtenstein's principal claim elaborated extensively in its Memorial.

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[243] The pertinent treaty was the Washington Accord concluded in 1946 between Switzerland, the United States of America, the United Kingdom and France.

[244] Case concerning *Elettronica Sicula S.p.A. (ELSI)*, *I.C.J. Pleadings*, Vol. III, p. 284.

[245] Case concerning *Elettronica Sicula S.p.A. (ELSI)*, *I.C.J. Reports* 1989, para. 51.

6.35 Germany bases its selective argument on Article 40 (1) of the Statute of the Court and on the Court's statement in the *Nuclear Tests* cases. However, Germany has misread both sources. Contrary to Germany's contention,[247] Article 40 (1) of the Statute does not provide that the Application "defines the subject of the dispute". According to that provision, the "subject of the dispute [...] shall be *indicated*" in the Application (emphasis added). The Application only serves as one among several tools to identify the subject of the dispute. This is corroborated by the Court's statement in the *Nuclear Tests* cases. Indeed, as Germany observed, the Court declared that the Application "must be the point of reference for the consideration by the Court of the nature and existence of the dispute brought before it".[248] However, the Court's reasoning was quoted by Germany in a rather selective manner; what remains unsaid by Germany is that only a few paragraphs later,[249] the Court was more explicit in determining the method how to "ascertain the true object and purpose of the claim". It added that "in doing so [...] it must take into account the Application as a whole, the arguments of the Applicant before the Court, the diplomatic exchanges brought to the Court's attention, and public statements made on behalf of the applicant Government". And indeed, in the *Nuclear* Tests cases, the Court heavily relied on the submissions and arguments made by the Applicant in the Memorial and, in particular, in the oral proceedings.[250]

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[246] GPO, para. 188. See also *ibid.*, paras. 181-182.

[247] GPO, para. 181.

[248] *Nuclear Tests* cases, *I.C.J. Reports* 1974, p. 260, para. 24; *ibid.*, p. 463, para. 24.

[249] *Ibid.*, para. 30.

[250] *Ibid.*, para. 27.

6.36 If one takes a look at Liechtenstein's submissions as a whole, in particular as laid down in the Memorial,[251] it will readily be seen that the direct injury inflicted by Germany upon Liechtenstein and consisting in the violation of Liechtenstein's neutrality and sovereignty is essential to Liechtenstein's claim. Therefore, contrary to the German submission, the *Interhandel* and the *ELSI* cases cannot be taken as precedents for the present case.

6.37 With regard to direct injury, Liechtenstein's claim is similar to that of the United States against Iran in the *Diplomatic and Consular Staff* case,[252] where United States nationals (diplomatic and consular personnel as well as private individuals) were held hostage in the premises of the United States Embassy in Tehran. In that case, none of the United States nationals, not even the private individuals, were required to exhaust local remedies, although the United States in its submissions explicitly stated that it exercised "its right of diplomatic protection of its nationals".[253] The Court considered the United States claim as one of direct injury, although private individuals were (also) affected by the violation. Likewise, in the *Military and Paramilitary Activities in and Against Nicaragua* case, Nicaragua claimed reparations as *parens patriae* for its citizens and, thus, exercised diplomatic protection. Again, no Nicaraguan citizen was required to exhaust local remedies before Nicaragua could pursue its claim.[254]

6.38 There are numerous other decisions by international courts and tribunals where the factual and legal situations bear resemblance to the present case and which support Liechtenstein's submission. Thus, in the *Air Service Agreement* arbitration between the United States and France, the tribunal held that the distinction between direct and indirect injury in relation to the application of the local remedies rule is based "on the *juridical* character of the *legal relationship* between States which is invoked in support of the claim".[255] The tribunal considered the right to conduct air transport services by one air carrier as a right "granted by *one government* to the other *government*".[256] Thus, although it was the air carriers as private companies which were injured by a breach of these rights, they were not required to exhaust local remedies before their States of nationality could bring an international claim against the wrongdoing State.

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[251] Memorial, paras. 4.1-4.43.

[252] *I.C.J. Reports* 1980, p. 3.

[253] *I.C.J. Reports* 1980, pp. 6-7.

[254] *I.C.J. Reports* 1986, pp. 19 *et seq.*

6.39 This line of reasoning was confirmed by the tribunal in the *Heathrow Airport* arbitration between the United States and the United Kingdom.[257] There, the tribunal, in addressing the question of the applicability or otherwise of the local remedies rule, thoroughly examined the legal relationship between the litigating States underlying the dispute. It analysed the subject matter of the dispute and drew an important distinction between the direct rights of the States and the rights of designated airlines. Although the "Bermuda Agreement" of 1977 referred to designated airlines, it did "not thereby confer independent rights on such airlines or alter the fact that the rights that it enshrines are those of the Contracting States".[258] The tribunal was influenced by the consideration that the conduct of air services was by its nature a State prerogative and thus prevailed over any interest of the private air companies. It concluded:

> "Although examination of the nature of [the United States'] claims and of the airlines' potential claims reveals that they overlap to a certain extent, at the same time they present significant differences; and taking the case as a whole and undivided into its constituent parts, the Tribunal is of the opinion that the predominant element is the direct interest of the US itself. Thus, examination of the subject matter of the dispute as a whole indicates that [the United States'] claim is properly to be regarded as distinct and independent."[259]

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[255] *Case Concerning the Air Service Agreement of 27 March 1946*, 1978, 18 *United Nations Reports of International Arbitral Awards*, pp. 417 *et seq.*, p. 431, para. 30 (emphasis in the original).

[256] *Ibid.*, para. 31 (emphasis in the original).

[257] *Case Concerning the Heathrow Airport User Charges*, 102 *International Law Reports* 1992, p. 216.

[258] *Ibid.*, para. 6.11.

[259] *Ibid.*, paras. 6.14, 6.15 and 6.18.

6.40 Finally, in the *Saiga* case decided by the International Tribunal for the Law of the Sea under the 1982 United Nations Convention on the Law of the Sea,[260] the Tribunal held that the breaches claimed by the applicant State were direct violations of the rights of that State, although they caused severe damage to private individuals and although Article 295 of the Convention on the Law of the Sea explicitly provides for the local remedies rule.[261]

6.41 The similarity between these cases and the present one is striking. In all these cases, direct State prerogatives were at stake, which prevailed over the interests of the private individuals also affected and injured by the breach. In the present case likewise, it is the State prerogative of Liechtenstein, i.e. that its interest that its neutrality and sovereignty be respected, which forms the very subject matter of the dispute. The fact that property rights of Liechtenstein nationals were infringed is a necessary corollary of the direct violations inflicted upon Liechtenstein by Germany, just as was the case with the private airline companies in the *Air Service Agreement* and the *Heathrow Airport* arbitrations or the private individuals in the *Saiga* case.

6.42 Germany lays much stress on the fact that Liechtenstein requests compensation from Germany for the losses suffered by Liechtenstein nationals[262] in order to show that Liechtenstein's claim preponderantly concerns indirect damage to its nationals. It is true that the remedy sought is sometimes considered to indicate whether the applicant State vindicates a direct right or whether it acts in the exercise of diplomatic protection.[263] However, this reparation remedy is only one among various others requested by Liechtenstein. Germany fails to mention that Liechtenstein also claims a variety of remedies for the direct injury it has suffered, in particular cessation, assurances and guarantees of non-repetition, declaratory relief and restitution. Further, in all the cases mentioned above, the applicant States likewise requested substantial amounts of financial compensation, but this fact did not prevent the tribunals from deciding that the applicant States were vindicating direct rights and that the local remedies rule was not applicable.

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[260] *The M/V "Saiga" (No. 2) Case*; ITLOS 1997, reprinted in 38 *International Legal Materials* 1999, p. 1323.

[261] *Ibid.*, para. 98.

[262] See GPO, paras. 182 and 189.

[263] See Dugard, Second Report on diplomatic protection, UN Doc. A/CN.4/514, Draft Article 11, p. 11.

6.43 For these reasons, Liechtenstein submits that the nature and subject matter of the dispute and the legal relationship of the norms and obligations invoked by Liechtenstein and breached by Germany essentially concern direct rights of Liechtenstein. Therefore, Liechtenstein has suffered direct injury, and the local remedies rule is not applicable.

SUBMISSIONS

For all these reasons, and reserving the right of the Principality of Liechtenstein to supplement them in view of any further German arguments, it is respectfully submitted:

(a) that the Court has jurisdiction over the claims presented in the Application of the principality of Liechtenstein, and that they are admissible;

and correspondingly

(b) that the Preliminary Objections of Germany be rejected in their entirety.

Dr. Alexander Goepfert
Agent of the Principality of Liechtenstein
Vaduz
15 November 2002

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Annex 48

EXCERPT OF THE REPORT OF THE SECOND ROUND OF BILATERAL CONSULTATIONS ON 14 JUNE 1999 IN VADUZ BY THE OFFICE FOR FOREIGN AFFAIRS OF THE PRINCIPALITY OF LIECHTENSTEIN

Translation of the German Original

of the excerpt of the report
of the second round of bilateral consultations
on 14 June 1999 in Vaduz by the Office for Foreign Affairs
of the Principality of Liechtenstein

"20. The head of the German delegation made the point that Germany denied the allegation that Liechtenstein assets had been collected by the State contrary to human rights. The Strasbourg Court would find whether the German judgments amounted to a violation of human rights. The compensation issue was to be solved in the direct relationship between Liechtenstein and the Czech Republic. It had been with much pleasure that Germany had taken notice of President Zeman's reaction before the Council of Europe. Germany could not share the view expressed in the opinion delivered by the Czech OSCE delegation. Neither could Germany concede that it had violated international law or claims under international law. As a result, contrary legal opinions had been created and this divergence of opinion would continue to exist even after this round of consultations. A solution could only be found at a higher level. There was the possibility of an exchange of Aide-Mémoires prior to a possible further round or otherwise a settlement by judicial decision without any further steps."

Annex 49

LIST OF THE FAMILIES AFFECTED BY THE CONSFISCATION MEASURES OF THE THEN CZECHOSLOVAKIAN GOVERNMENT UPDATED BY THE OFFICE FOR FOREIGN AFFAIRS OF THE PRINCIPALITY OF LIECHTENSTEIN AS OF NOVEMBER 2002

List of the families affected by the consfiscation measures of the then Czechoslovakian Government updated by the Office for Foreign Affairs of the Principality of Liechtenstein as of November 2002

Note: ***The Principality of Liechtenstein submits this updated list with full reservation of its rights to make further adjustments. The Office for Foreign Affairs of the Principality of Liechtenstein has an ongoing investigation into the status of those persons on the 1945 list (Annex 8).***

1. **von Berg Baronin, Hedwig** (died 1958)
    - (a) Heirs/children:
        - Child Maria Hedwig (born 1951), Liechtenstein citizen
    - (b) Assets:
        - Real estate in Sahy (approx. 2,583 ha)
        - Real estate in Drienov/Dreno (approx. 452 ha)

2. **Bloch Dr., Albert** (died 1963)
    - (a) Heirs/children:
        - Still under investigation
    - (b) Assets:
        - Securities

3. **Brändle, Ida**
    - (a) Heirs/children:
        - Still under investigation

(b) Assets:
- Share in hotel *Goldener Löwe* in Karlovy Vary/Karlsbad

4. **de Charmant, Marie**
   (a) Heirs/children:
   - Child Anna Barbara (born 1958), Liechtenstein citizenship to be verified

   (b) Assets:
   - Shares of the factory *Surany Zuckerfabrik*, Velke Surany

5. **de Charmant, Pierre**
   (a) Heirs/children:
   - Child Anna Barbara (born 1958), Liechtenstein citizenship to be verified

   (b) Assets:
   - Shares of the factory *Surany Zuckerfabrik*, Velke Surany

6. **von Falz Fein Baronin, Antonia**
   (a) Heirs/children:
   - Child Tamara, not Liechtenstein citizen
     - Delia (born 1941), Liechtenstein citizen

   (b) Assets:
   - Jewelery
   - Deposits

7. **von Frankl, Maria** (died 1994)
   (a) Heirs/children:
   - Child Assunta Maria, not Liechtenstein citizen

   (b) Assets:
   - Real estate in Velke Sarovce, including agricultural property (approx. 420 ha)

8. **Hartmann, Gerty** (died 1994)
   - (a) Heirs/children:
     - Child Eva Hartmann (born 1949), Liechtenstein citizen
     - Child Barbara Hartmann (born 1953), Liechtenstein citizen
   - (b) Assets:
     - Share in factory and real estate in Neudorf/N Nova Ves N Jablonce/ Gablonz

9. **von Janotta, Dorothea** (died 1982)
   - (a) Heirs/children:
     - Still under investigation
   - (b) Assets:
     - Deposits
     - Securities
     - Real estate in Stemplovce, Opava (approx. 10 ha)
     - Other property

10. **von Königswarter Baron, Johann Alexander** (died 1959)
    - (a) Heirs/children
      - Wife (died 1992); heirs still under investigation
    - (b) Assets:
      - Real estate in Sebetov/Schebetan, Boskoviece/Moravia (approx. 4,000 ha)
      - Deposits
      - Securities
      - Jeweleries
      - Other property

11. **von Liechtenstein Prinz, Alois** (died 1955)

(a) Heirs/children:

Heirs are the children of Prinz Karl Alfred:

- Dominik (born 1950), Liechtenstein citizen
- Andreas (born 1952), Liechtenstein citizen
- Gregor (born 1954), Liechtenstein citizen
- Alexandra (died 1993), Liechtenstein citizen
- Maria Pia (born 1960), Liechtenstein citizen
- Katharina (born 1964), Liechtenstein citizen
- Birgitta (born 1967), Liechtenstein citizen

(b) Assets:

- Real estate in Velke Losiny (Gross Ullersdorf), Northern Moravia (approx. 5,800 ha)
- Shares in companies: *Riechenberg-Maffersdorfer Brauerei; Nordmährische Brauerei und Malzfabrik; Verein. Schafwollwarenfabrik; Nationalbank für Böhmen; Leipnik-Lundenburger Zuckerfabrik; Bau- und Wohnungsgenossenschaft Jägerndorf; Rübenverwertungsgenossenschaft Pohrlitz; Molkereigenossenschaft Lundenburg; Rübenverwertungsgenossenschaft Lundenburg*
- Securities

12. **von Liechtenstein Fürst, Franz Josef** (died 1989)

(a) Heirs/children:

- Child Fürst Hans Adam II (born 1945), Liechtenstein citizen
- Child Philipp (born 1946), Liechtenstein citizen
- Child Nikolaus (born 1947), Liechtenstein citizen
- Child Nora (born 1950), Liechtenstein citizen
- Child Wenzel (died 1991), Liechtenstein citizen

(b) Assets:

- Claims
- Securities
- Deposits at the National Bank
- Art Collection
- Forestry and agricultural land (total of approx. 84,342 ha) in:

  Auřnowes/Skworetz (8,218 ha), Aussee/Neuschloß (7,725 ha), Butschowitz/Butschowitz (5,375 ha), Eisenberg/Nieder-Eisenberg (5,451 ha), Eisgrub/Eisgrub (2,846 ha), Goldenstein/Hannsdorf (9,537 ha), Hohenstadt/Hohenstadt (6,992 ha), Jägerndorf (Troppau, Pickau, Bransdorf)/Jägerndorf (9,621 ha), Karlsberg/Karlsberg (4,540 ha), Kaunitz/Kaunitz (2,711 ha), Kiritein (Adamsthal, Posořitz)/Adamsthal und Posořitz (14,694 ha), Landskron/Landskron (6,195 ha), Lundenburg/Lundenburg (7,176 ha), Ostra-Ung./Ung. Ostra (7,233 ha), Plumenau/Plumenau (12,960 ha), Radim/Radim (3,292 ha), Rattay/Rattay (3,687 ha), Rumburg/Rumburg (2,563 ha), Schwarzkosteletz/ Schwarzkosteletz (9,775 ha), Steinitz/Butschowitz (8,935 ha), Sternberg (Kloster-Hradisch)/Sternberg and Olmütz (9,771 ha), Trübau/Mähr. Trübau (6,268 ha)
- Shares in companies:

  "Krizik" Prager Metall-, Kabel- und elektrotechnische Werke; Böhmische Handelsgesellschaft AG; Westböhmische Kaolin-Schamotte und slowenische Magnesitwerke AG; Verein für chemische und metallurgische Produktion; Böhmische-Mährische Maschinenfabriken AG; Zukkerfabrik Schoeller & Co. AG; Bösinger Ziegelwerke AG; Fürst Liechtenstein Kohlen- und Tonwerke; Blosdorf; Lukawetzer Maschinenpapier Fabrik Ges.m.b.H.; Jan Heitmanek Kaolinitové doly, Prague; Prager Creditbank Aktien; Nationalbank für Böhmen; Troppauer Zuckerraffinierie; Böhmische Handelsgesellschaft; Nordmährische Brauerei M. Schönberg; Zettlitzer Kaolinwerke; Riechenberg-Maffersdorfer AG; Berg- und Hüttenwerks Gesellschaft; Böhmisch-Mährische Maschinen-

fabrik Kolben; Brauerei und Malzfabrik Lundenburg; Leipnik-Lundenburger Zuckerfabrik; Bau- und Wohnungsgenossenschaft Jägerndorf; Rübenverwertungsgenossenschaft Pohrlitz; Molkereigenossenschaft Lundenburg; Rübenverwertungsgenossenschaft Lundenburg

13. **von Liechtenstein Prinz, Friedrich** (died 1959)
    (a) Heirs/children:
    - Child Aloys (died 1943), Liechtenstein citizen
        - Luitpold (born 1940), Liechtenstein citizen
        - Maria-Gabrielle (born 1942), Liechtenstein citizen
    - Child Alfred (died 1972), Liechtenstein citizen
        - Alexander (born 1929), Liechtenstein citizen
        - Elisabeth (born 1932), Liechtenstein citizen
        - Franz de Paula (died 1987), Liechtenstein citizen
    - Child Aloysia (died 1993), Liechtenstein citizen

    (b) Assets:
    - Securities

14. **von Liechtenstein Prinzessin, Irma** (died 1956)
    (wife of Friedrich, see No. 13 above)

15. **von Liechtenstein Prinz, Emanuel** (died 1987)
    (heirs are children of Hans, see No. 16 below)

16. **von Liechtenstein Prinz, Hans** (died 1975)
    (a) Heirs/children:
    - Child Maria (died 2002), Liechtenstein citizen
    - Child Eugen (born 1939), Liechtenstein citizen
    - Child Albrecht Johannes (born 1940), Liechtenstein citizen
    - Child Barbara (born 1942), Liechtenstein citizen

(b) Assets:

- Real estate near Ceska Lipa/Böhmisch Leipe Zahradkyn Ceska Lipa (approx. 2,000 ha)
- Real estate in Neuschloß

17. von **Liechtenstein Prinzessin, Ludmilla** (died 1974)

(a) Heirs/children:

- Child Maria Christa (born 1933), Liechtenstein citizen
- Child Franz (born 1935), Liechtenstein citizen
- Child Friedrich (born 1937), Liechtenstein citizen
- Child Anton (born 1940), Liechtenstein citizen

(b) Assets:

- Usufructuary rights in possessions in Melnik
- Real estate near Zabreh (approx. 2,515 ha) and Pisek (approx. 2,800 ha)

18. von **Liechtenstein Prinzessin, Olga** (died 1966)

(a) Heirs/children:

- Child Johannes (died 1979), Liechtenstein citizen
  - Wife Jean (born 1917), Liechtenstein citizenship to be verified
- Child Ferdinand (died 1981), Liechtenstein citizen
  - Johannes (born 1941), Liechtenstein citizen
- Child Eduarda (died 2001), Liechtenstein citizen
- Child Gabrielle (died 1999), Liechtenstein citizen
- Child Louisanne (died 1994), Liechtenstein citizen

(b) Assets:

- Forest land and real estate in Wamberg/Bohemia (approx. 887 ha)

19. **Näscher, Franzisca** (died 2001)

(a) Heirs/children:

- Child Otto (born 1939), Liechtenstein citizen

  - Child Leanda (born 1941), Liechtenstein citizen
  - Child Friedrich (born 1943), Liechtenstein citizen
  - Child Rita (born 1944), Liechtenstein citizen
  - Child Bertram (born 1945), Liechtenstein citizen
  - Child Dietmar (born 1948), Liechtenstein citizen
  - Child Rudolf (born 1949), Liechtenstein citizen
  - Child Christina Franziska (born 1953), Liechtenstein citizen

(b) Assets:

  - Real estate in Troppau

20. **Nissl Dr., Hans** (died 1985)

(a) Heirs/children:

  - Child Dorothea Vossl (born 1920), Liechtenstein citizenship to be verified

(b) Assets:

  - Real estate in Ceska Budejovice/Budweis
  - Securities

21. **Nissl, Renate**

(first wife of Hans, see No. 20 above)

22. **Nitzsche, Gunther** (died 1951)

(a) Heirs/children:

  - Wife Anni Nitsche (born 1923), Liechtenstein citizen
  - Child Walter (born 1949), Liechtenstein citizen
  - Child Heinz (born 1954), Liechtenstein citizen
  - Child Brigitte (born 1958), Liechtenstein citizenship to be verified

(b) Assets:

- Real estate in Karlovy Vary/Karlsbad
- Real estate (agricultural property) and companies in Horni Slavkov (approx. 1 ha)

23. **Nitzsche, Hugo Alfred**
(father of Gunther, see No. 22 above)

24. **Nitzsche, Melanie**
(mother of Gunther, see No. 22 above)

25. **Nottebohm, Harriet** (died 1967)

(a) Heirs/children:

- Assumed no heirs with Liechtenstein citizenship

(b) Assets:

- Securities

26. **Nottebohm, Hermann** (died 1963)

(a) Heirs/children:

- Assumed no heirs with Liechtenstein citizenship

(b) Assets:

- Securities

27. **Reitzes-Marienwert Baronin, Maria**

(a) Heirs/Children:

- Child Erwin (died 1953), Liechtenstein citizenship to be verified
  - Irene (born 1942), Liechtenstein citizenship to be verified
  - Erwin (born 1944), Liechtenstein citizenship to be verified
- Child Elisabeth, Liechtenstein citizenship to be verified

(b) Assets:

- Shares in factory in Nitra

28. **Risch, Adolf** (died 1973)

(a) Heirs/children:

- Child Helena (died 1997), Liechtenstein citizen
- Child Adolf (presumed dead), Liechtenstein citizen
- Child Gustav (died 1946), Liechtenstein citizen
- Child Alois (born 1929), Liechtenstein citizen
- Child Irena (born 1933), Liechtenstein citizen

(b) Assets

- Company in Pistyan
- Real estate and leaseholds

29. **Schädler, Gertrud**

(a) Heirs/children:

- Can no longer be traced

(b) Assets:

- Securities

30. **Schädler, Stefanie Marianne**

(a) Heirs/children:

- Can no longer be traced

(b) Assets:

- Securities

31. **Seemann, Albin**

(a) Heirs/children:

- Peter (born 1915), Liechtenstein citizen (see No. 32 below)
- Mariette (born 1924), Liechtenstein citizenship to be verified

(b) Assets:

- Real estate in Bratislava
- Bank deposits

32. **Seemann, Peter**

(a) Heirs/children:

- Child Nikolaus
- Child Carl

(b) Assets:

- Real estate in Bratislava
- Bank deposits

33. **Strauss, Minka**

(a) Heirs/children:

- Still under investigation

(b) Assets:

- Share in real estate in Sopoma

34. **Tomala, Olga** (died 1971)

(a) Heirs/children:

- Child Maria, not Liechtenstein citizen

(b) Assets:

- Securities

35. **Wanger, Anton**

(a) Heirs/children:

- Can no longer be traced

(b) Assets:

- Securities

36. **Weiss, Antonie** (born 1919)

(a) Heirs/children:

- Can no longer be traced

(b) Assets:

- Deposits

37. **Wilczek Graf, Ferdinand** (died 1977)

(a) Heirs/children:

Heirs are children of Fürst Franz Josef (see No. 12 above)

- Prinz Philipp (born 1946), Liechtenstein citizen
- Prinz Nikolaus (born 1947), Liechtenstein citizen
- Prinzessin Nora (born 1950), Liechtenstein citizen

(b) Assets:

- Shares in mines in Ostrava
- Securities

38. **Wurmbrand Steppach Gräfin, Mignon** (died 1958)

This lady is in fact Baronin Hedwig von Berg, No. 1 above.

APPENDICES

Appendix I

GERMAN JURISPRUDENCE AND DOCTRINE CONCERNING THE INADMISSIBILITY RULE (ARTICLE 3 OF CHAPTER SIX OF THE SETTLEMENT CONVENTION)

German Jurisprudence and Doctrine concerning the Inadmissibility Rule (Article 3 of Chapter Six of Settlement Convention)

A1. To a significant extent, Germany's arguments in its Preliminary Objections depend on the proposition that German jurisprudence on the application of the inadmissibility rule[1] has been consistent since the 1950s, and that it was always clear that the inadmissibility rule applied to the Liechtenstein property. An examination of the cases demonstrates that this is not so (A). Likewise Germany's position finds no support in the German doctrine (B).

A. German Jurisprudence

A2. The cases referred to in the German Preliminary Objections as founding the German claim to a consistent and unchanging jurisprudence are incomplete. A list of the decisions of German Supreme Courts prior to 1995 is set out in the **Table** on the following page.

A3. In fact none of the eight cases in the **Table** dealt with Beneš Decree No. 12 or with neutral property. None dealt with property of Liechtenstein citizens.

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[1] The inadmissibility rule was initially contained in Allied High Commission (AHC) Law No. 63, and was subsequently reformulated in Article 3 of Chapter Six of the Settlement Convention. See Memorial, paras. 2.22-2.35 for the terms of the relevant provisions.

Table of German Cases

	Court	Decision	Publication[2]	Assets involved	Expropriation	Basis of inadmissibility
1	***Bundesgerichtshof*** **(Federal Court of Justice)**	**20/01/1953 IV ZR 201/51**	*BGHZ* Vol. 8, p. 378; *IPRspr.* 1952/53, p. 591	Sudeten-German furniture	Decree No. 5 and No. 108	AHC Law No. 63 applied
2	***Bundesgerichtshof*** **(Federal Court of Justice)**	**07/06/1955 I ZR 64/53**	*BGHZ* Vol. 18, p. 1	Sudeten-German trade-mark registered in Czechoslovakia	Decree No. 100	AHC Law No. 63 **not** applied
3	***Bundesgerichtshof*** **(Federal Court of Justice)**	**13/12/1956 II ZR 86/54**	*Neue Juristische Wochenschrift* 1957, p. 217; 23 *ILR* 21; GPO, Annex 2	German-owned shares in Dutch company	Netherlands Enemy Property Law	Settlement Convention Chapter Six applied
4	***Bundesfinanzhof*** **(Federal Court of Finance)**	**18/05/1957 III 229/56 U**	*Wertpapier-Mitteilungen* 1957, p. 888	Sudeten-German assets of a liquidated association transferred to the Western Zones	Decree not identified (not Decree No. 12)	AHC Law No. 63 **not** applied
5	***Bundesarbeitsgericht*** **(Federal Labour Court)**	**28/10/1958 2 AZR 499/56**	*Arbeitsrechtliche Praxis* No. 2 *International Private Law* 1959, p. 303	Sudeten-German retirement payments	Decree No. 108	AHC Law No. 63 **not** applied
6	***Bundesgerichtshof*** **(Federal Court of Justice)**	**11/04/1960 II ZR 64/58**	*BGHZ* Vol. 32, p. 170; GPO, Annex 3	Assets which were considered "enemy-associated" by US Court (Art. 6 E, Paris Agreement on Reparations from Germany (Annex 13 of the Memorial))	US Trading with the Enemy Act, US Vesting Order 19258	Settlement Convention Chapter Six applied
7	***Bundesgerichtshof*** **(Federal Court of Justice)**	**21/05/1974 GSZ 2/72**	*BGHZ* Vol. 62, p. 340	Assets of a confiscated Dutch but German owned corporation situated in FRG	Netherlands Enemy Property Law	AHC Law No 63 **not** applied
8	***Bundesverfassungsgericht*** **(Federal Constitutional Court)**	**23/4/1991 1 BvR 1170, 1174, 1175/90**	*BVerfGE* Vol. 84 p. 90; 94 *ILR* 44; GPO, Annex 4	German property seized in GDR 1945-1949; effect of Unification Treaty in excluding restitu-	Internal GDR decrees	Settlement Convention Chapter Six **not** applied

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[2] **Abbreviations used in this table:** BGHZ: ***Entscheidungen des Bundesgerichtshof in Zivilsachen*** (Decisions of the Federal Court of Justice in Civil Matters); BVerfGE: *Entscheidungen des Bundesverfassungsgerichts* (Decisions of the Federal Constitutional Court); ILR: *International Law Reports*; IPRspr.: *Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts* (Collection of German case-law in International Private Law Matters).

A4. The majority of the decisions of German Supreme Courts (*Bundesgerichtshof* (Federal Court of Justice), *Bundesfinanzhof* (Federal Court of Finance) and *Bundesarbeitsgericht* (Federal Labour Court)) dealing with the expropriation by the Beneš Decrees and the inadmissibility rule did not apply that rule, even though the relevant assets were directly or indirectly affected by the Beneš Decrees. These cases (Nos. 2, 4, 5 and 7 in the **Table**) are not dealt with by Germany in its Preliminary Objections.

A5. Only two cases refer to the inadmissibility rule contained in Article 3 of Chapter Six of the Settlement Convention. These are Cases Nos. 3 and 6 in the **Table**. In Case No. 3, the Court was concerned with German-owned shares in a Dutch company which were seized under the Dutch enemy property law. In Case No. 6, the Court had to deal with a seizure under the US Trading with the Enemy Act, enforced by a vesting order of the United States, one of the Four Powers exercising supreme authority in Germany. Neither case concerned neutral property; neither case concerned an expropriation under the Beneš Decrees. In both cases there was a clear connection with World War II, and with the terms and purposes of the Settlement Convention.

A6. Germany primarily relies on Cases Nos. 1 and 6 as supporting its claim to a consistent and unchanging jurisprudence including Liechtenstein assets in the post-war reparations regime. Neither of these cases provides any such support.

A7. Case No. 6, the "leading case" as far as the Preliminary Objections are concerned, has to be distinguished from the factual and legal situation in relation to the Liechtenstein property, *inter alia* on the following grounds:

(a) A vesting order made by a power which exercises supreme authority in Germany has an entirely different impact on the German legal order than an expropriation by a foreign State enjoying only the privilege of an associated power.

(b) When applying the Trading with the Enemy Act, the United States government made it quite clear that the expropriation complained of was carried out in context of the war against Germany. This indispensable element for the application of the Settlement Convention and its inadmissibility rule is lacking in the case of Liechtenstein. The confiscation of Liechtenstein assets after World War II by Czechoslovakia could not have been (and was not) carried out in a context of the war against Germany. In fact the Czechoslovak Government did not purport to seize Liechtenstein property for reparation purposes.

A8. As to Case No. 1, its *ratio decidendi* supports the Liechtenstein point of view rather than the German claim to a jurisprudence including the confiscation of neutral property in the post-war reparations regime. According to this decision, an expropriation is only a seizure for reparation purposes within the meaning of the inadmissibility rule of AHC Law No. 63 if it satisfies the twin conditions of being made in the context of the war against Germany and in order to satisfy claims against Germany. These conditions do not apply to the Liechtenstein case. Until the *Pieter van Laer* case was decided, the German courts had always required that these two conditions be fulfilled in order to justify the application of AHC Law No. 63 or of the equivalent rule in the Settlement Convention. These conditions do not, of course, apply to the assets of neutrals.

A9. In all the cases in which the German courts applied the inadmissibility rule, they deferred to the interpretation of the expropriating state or accepted its categorisation of the property only where the taking of property was referable to World War II by reason of foreign affiliation. Until the *Pieter van Laer* case, German courts never applied AHC Law No. 63 or Article 3 of Chapter Six of the Settlement Convention to confiscations which the expropriating state declared not to be a reparation measure. In the *Pieter van Laer* case, counsel for the Czech party, intervening, expressly denied that the taking of the painting was a reparation measure.

A10. The decisions of the courts referring to expropriations under the Beneš Decrees (Cases Nos. 1, 2, 4 and 5) show that they are clearly based on the German *Kompe-*

tenz-Kompetenz. Examining the expropriating measures of Czechoslovakia in the light of the inadmissibility rule, the courts were able either to accept expropriation measures of a specific category (e.g., Decree No. 108) or not to accept them (e.g., Decree No. 100). Moreover they could unilaterally limit the effects of the expropriating measures within their jurisdiction. The German case law did not provide clear justifications for distinguishing between the application of one Beneš Decree and the non-application of another. The case law of the Supreme German Courts is thus not consistent.

A11. Decisions of lower courts are not included in the **Table**, but none of these support Germany's position either. Indeed there is not a single case in which a lower German court applied the inadmissibility rule (Article 3 AHC Law No. 63 or Article 3 of Chapter Six of the Settlement Convention) to Liechtenstein assets. On the other hand, there are lower court decisions which expressly deviated from the Federal Court of Justice's jurisprudence affirming German jurisdiction in cases in which the relevant (Sudeten German) property had been confiscated by a Beneš Decree. Thus in *Baudisch vs. L. Bernheimer KG*, another action of restitution concerning a valuable antiquity, the Munich Regional Court did not follow the extensive interpretation of purposes of reparation defined by the Federal Court of Justice. In this case a Sudeten German sued a Munich antique dealer for the return of his tabernacle cabinet he had to leave behind in 1945, when he was expropriated by Beneš Decree No. 108 and expelled from Czechoslovakia. Via the "grey market", the cabinet had later found its way to the defendant's booth at the Munich Antique Fair. The Munich Regional Court expressly deviated from the Federal Court of Justice's case-law and affirmed German jurisdiction because the cabinet is not to be subsumed under the term "German property seized for the purpose of reparation". The court assumed that by enacting confiscation measures, the Czechoslovakian State wished to punish ethnic Germans for treason committed by them.[3]

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[3] *Landgericht München I* (Regional Court of Munich), 21st Civil Chamber, Judgment, 17 December 1971 (ref. No. 21.0.296/68). For extracts from the judgment see D. Blumenwitz, *Der Prager Vertrag - Eine Einführung und Dokumentation zum Vertrag vom 11. Dezember 1973 unter besonderer Berücksichtigung des Münchner Abkommens und seiner Auswirkungen auf Deutschland als Ganzes*, 1985, p. 91.

B. German Doctrine

A12. Germany's assertion that there was no change of position and that it applied the inadmissibility rule consistently can also be tested by asking whether the German scholarly literature ever (before 1995) envisaged that the inadmissibility rule might be applied to the Liechtenstein property. The answer is a categorical no.

A13. Until the *Pieter van Laer* case, none of the academic observers has seen in the German jurisprudence concerning the inadmissibility rule (AHC Law No. 63, Article 3; Article 3 of Chapter Six of the Settlement Convention) the potential that neutral Liechtenstein assets could have been seized for reparation purposes.

A14. In argument in the *Pieter van Laer* case, the German government referred to a work by Hermann Raschhofer.[4] But even Raschhofer refers only to Sudeten German assets and not to any Liechtenstein property. Moreover Raschofer's was a minority view. Until recently, the overwhelming majority of academic observers was of the opinion that not even Sudeten German assets had been seized for reparation purposes.

A15. In fact the *Pieter van Laer* decisions of the German courts were heavily criticised by German and Austrian scholars of high standing, including Professor Dr. Karl Doehring and Professor Dr. Ignaz Seidl-Hohenveldern.[5]

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[4] H., "Die Deutsche Reparationsregelung und die Reparationsposition der Tschechoslowakei", in H. Kipp, F. Mayer, A. Steinkamm (eds.), *Festschrift für Friedrich August Freiherr von der Heydte*, 1977, pp. 495-513.

[5] See I. Seidl-Hohenveldern, "Völkerrechtswidrigkeit der Konfiskation eines Gemäldes aus der Sammlung des Fürsten von Liechtenstein als angeblich 'Deutsches Eigentum': Ein unrühmlicher Schlußpunkt", *Praxis des Internationalen Privat- und Verfahrensrechts* 1996, pp. 410 *et seq.*, p. 411 (commenting on the decision of the *Landgericht Köln* (Regional Court of Cologne) in the light of BGHZ 8, 378 and BGHZ 32, 170); I. Seidl-Hohenveldern, "Schafft Plünderung Eigentum?", *Praxis des Internationalen Privat- und Verfahrensrechts* 2000, p. 321 (commenting on the decision of the *Oberlandesgericht Köln* (Cologne Court of Appeal); I. Seidl-Hohenveldern, "Nachwirkung der Kontrollratsgesetzgebung und die deutsche Souveränität - zu den Urteilen über die 'Bodenreform' und zur Fortgeltung des Klagestops nach dem Überleitungsvertrag", in *Liber amicorum Günther Jaenikke, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* 1998, Vol. 135, pp. 975 *et seq.*, p. 984 (commenting on the Federal Court of Justice's sweeping reliance on precedent); K. Doehring, *Praxis des Internationalen Privat- und Verfahrensrechts* 1998, pp. 465 *et seq.*, p. 467 (commenting on the inapplicability of the Czechoslovakian enemy legislation in the *Prince Hans-Adam II of Liechtenstein* case). See also D. Blumenwitz, "Versteckte Kollisionsnormen in völkerrechtlichen

A16. Moreover German scholars did not believe that the courts would have no alternative but to support such a characterisation of the Liechtenstein property, should the question arise. Before the *Pieter van Laer* case, German legal thought supported the conclusion that the German courts retained *Kompetenz-Kompetenz* in terms of the scope of application of the Settlement Convention. The *Kompetenz-Kompetenz* of German courts was demonstrated by reference to the case of Sudeten Germans expropriated by the Beneš Decrees. *A fortiori* those decrees could have no application to neutral property.

A17. The source most frequently referred to is an article of Professor Dr. Christian Tomuschat on: "The Expulsion of the Sudeten Germans - Entering into the question of the existence of Legal Claims under International and German Law".[6] Tomuschat refers to the German jurisprudence concerning the inadmissibility rule and especially to the decision of the Federal Court of Justice of 29 January 1953 (Case No. 1 in the **Table**). This was the only Beneš Decree/Sudeten German case in which the inadmissibility rule was actually applied. Tomuschat writes:

> "This very decision of the Federal Supreme Court of 29 January 1953 - with its interpretation that the Inadmissibility Rule of AHC Law No. 63, as predecessor of the relevant provision of the Settlement Convention, relates to Sudeten German assets - fails, in fact, to convince in this respect."[7]

His reasons are:

> "It is not apparent that they [*scil.* the Western Allies] could have had even the slightest interest in giving preference to Czechoslovakia as a third country ... The Federal Republic of Germany would therefore demonstrate an ex-

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Verträgen? - Der liechtensteinische Bilderstreit in Deutschland", in *Mélanges Fritz Sturm*, Liège 1999, pp. 1385-1398; D. Blumenwitz, "Die Liechtenstein-Entscheidung des Europäischen Gerichtshofs für Menschenrechte", 40 *Archiv des Völkerrecht* 2002, pp. 215-242.

[6] "Die Vertreibung der Sudetendeutschen - Zur Frage des Bestehens von Rechtsansprüchen nach Völkerrecht und deutschem Recht", 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1996, pp. 1-69.

[7] *Ibid.*, p. 57.

> cessive amount of inappropriate obedience if it were to interpret Article 3 of Chapter Six of the Settlement Convention in the version due to the agreement of 27/28 September 1990 and still applicable today, as also relating to the Sudeten German assets."[8]

A18. Again, there is no suggestion, even in this recent work, that the Settlement Convention was thought of as applying to neutral (Liechtenstein) property.

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[8] *Ibid.*

THIS IS TO CERTIFY THAT

- the List of Annexes is complete and correct and contains all annexes attached to the Observations;
- the List of Appendices is complete and correct and contains all appendices attached to the Observations;
- all translations of the German originals contained in this binder are complete and correct;
- all copies contained in this binder are complete and correct copies of the original.

Dr. Alexander Goepfert
Agent for the Principality of Liechtenstein
15 November 2002

ORAL ARGUMENTS ON THE PRELIMINARY OBJECTIONS

VERBATIM RECORDS OF THE HEARINGS

held at the Peace Palace, The Hague, from 14 to 18 June 2004,
President Shi, presiding

PLAIDOIRIES RELATIVES AUX EXCEPTIONS PRÉLIMINAIRES

COMPTES RENDUS DES AUDIENCES

tenues au Palais de la Paix, à La Haye, du 14 au 18 juin 2004,
sous la présidence de M. Shi, président

CR 2004/24

YEAR 2004

Public sitting

held on Monday 14 June 2004, at 10 a.m., at the Peace Palace,

President Shi presiding,

***in the case concerning* Certain Property (Liechtenstein *v.* Germany)**

ANNÉE 2004

Audience publique

tenue le lundi 14 juin 2004, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***en l'affaire relative à* Certains biens (Liechtenstein c. Allemagne)**

Present:	President	**Shi**
	Vice-President	**Ranjeva**
	Judges	**Guillaume**
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Tomka
	Judges *ad hoc*	**Fleischhauer**
		Sir Franklin Berman
	Registrar	**Couvreur**

The Government of the Federal Republic of Germany is represented by:

Mr. Thomas Läufer, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Edmund Duckwitz, Ambassador of the Federal Republic of Germany to the Kingdom o the Netherlands,

as Agents;

Mr. Jochen Frowein, Director emeritus of the Max-Planck-Institute for Comparative Public Law and International Law Heidelberg, Professor of Public International Law, University o Heidelberg,

Mr. Christian Tomuschat, Professor of Public International Law, Humboldt-University of Berlin,

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Pari (Panthéon-Assas) and the European University Institute of Florence,

as Counsel;

Mr. Daniel Erasmus Khan, Privatdozent, Visiting Professor at the University Bayreuth,

Mr. Andreas Paulus, University of Munich,

Ms Karin Oellers-Frahm, Max-Planck-Institute for Comparative Public Law and International Law Heidelberg,

Ms Susanne Wasum-Rainer, Head of the Public International Law Division, Federal Foreig Office,

Mr. Reinhard Hassenpflug, Federal Foreign Office,

Mr. Götz Reimann, Embassy of the Federal Republic of Germany,

as Advisers;

Ms Fiona Sneddon,

as Assistant.

The Government of the Principality of Liechtenstein is represented by:

H.E. Mr. Alexander Goepfert, Freshfields Bruckhaus Deringer, Düsseldorf, Special Commissione of the Principality of Liechtenstein,

as Agent;

H.E. Mr. Roland Marxer, Ambassador, Director of Office for Foreign Affairs of the Principality o Liechtenstein

as Advocate;

Mr. Dieter **Blumenwitz**, Professor of Public International Law, University of Würzburg and Munich,

Mr. Thomas **Bruha**, Professor of Public Law, University of Hamburg,

Mr. James **Crawford**, S.C., Whewell Professor of International Law, University of Cambridge, member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Gerhard **Hafner**, Professor of Public International Law, University of Vienna, Associate Member of the Institute of International Law,

Mr. Alain **Pellet**, Professor at the University of Paris X-Nanterre, member and former Chairman of the International Law Commission,

as Counsel and Advocates;

Mr. Malcolm **Forster**, Professor of International Law, University College, London, Freshfields Bruckhaus Deringer, London,

Ms Juliane **Hilf**, member of the Chamber of Lawyers of Germany, Freshfields Bruckhaus Deringer, Cologne,

Ms Lucy **Reed**, member of the State Bar of New York, Freshfields Bruckhaus Deringer, New York,

as Advocates;

Mr. Daniel **Müller**, Temporary Lecturer and Research Assistant at the University of Paris X-Nanterre,

Mr. Stephan **Wittich**, Assistant Professor at the University of Vienna,

as Advisers;

Ms Nadine **Heider**, Freshfields Bruckhaus Deringer, Cologne,

Ms Gabriele **Klein**, Freshfields Bruckhaus Deringer, Düsseldorf,

as Assistants;

Mr. Thomas **Dillmann**, ECC Kohtes Klewes,

Mr. Thomas **Pütz**, ECC Kohtes Klewes,

as Information Officers.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today, pursuant to Article 79, paragraph 6, of the Rules of Court, to hear the oral arguments of the Parties on the Preliminary Objections raised by the Respondent in the case concerning *Certain Property (Liechtenstein* v. *Germany)*.

Before recalling the principal phases of the present proceedings, it is necessary to complete the composition of the Court.

On 17 March 2003, the Registrar informed the Parties that Judge Simma, of German nationality, had indicated to the Court that he did not intend to participate in the decision of the case, pursuant to Article 17, paragraph 2, of the Statute. Article 37, paragraph 1, of the Rules of Court provides that:

> "If a Member of the Court having the nationality of one of the parties is or becomes unable to sit in any phase of a case, that party shall thereupon become entitled to choose a judge *ad hoc* within a time-limit to be fixed by the Court, or by the President if the Court is not sitting."

Germany accordingly chose Mr. Carl-August Fleischhauer to sit as judge *ad hoc*. Since Judge Fleischhauer, after a brilliant career as Legal Adviser of the Federal Foreign Office of the Federal Republic of Germany as well as Legal Counsel of the United Nations, was a Member of this Court from 1994 till 2003, I do not need to say more than that we welcome his renewed presence on the Bench.

Since in the present case the Court does not include upon the Bench a judge of the nationality of the Principality of Liechtenstein, that Party has also availed itself of its right, under Article 31, paragraph 2, of the Statute, to choose a judge *ad hoc*, and it first chose Mr. Ian Brownlie, who resigned on 25 April 2002, and subsequently Sir Franklin Berman. Sir Franklin Berman, a barrister with a long career specializing in international law and diplomacy, has been Legal Adviser of the Foreign Office of Great Britain and represented his country in cases before this Court as well as in a multitude of international negotiations. He is a member of many international committees concerned with the administration of justice, and the current chairman of the International Law Association's Committee on the Accountability of International Organisations. He is also visiting Professor of International Law at Oxford University, the University of Cape Town and King's College, London.

Article 20 of the Statute requires that every Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously, and this provision applies equally to judges *ad hoc*. Accordingly, I now invite Judges Fleischhauer and Sir Franklin Berman to make the solemn declaration provided for by Article 20 of the Statute and I ask you all to rise. Judge Fleischhauer.

Judge FLEISCHHAUER:

> «Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

The PRESIDENT: Thank you. Sir Franklin.

Judge Sir Franklin BERMAN:

> "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: Thank you. Please be seated. The Court takes note of the solemn declarations made by Judges Fleischhauer and Berman and I declare them duly installed as judges *ad hoc* in the case concerning *Certain Property (Liechtenstein* v. *Germany)*.

*

I shall now recall the procedure so far followed in this case. On 1 June 2001, Liechtenstein filed in the Registry of the Court an Application instituting proceedings against Germany relating to a dispute concerning "decisions of Germany, in and after 1998, to treat certain property of Liechtenstein nationals as German assets having been 'seized for the purposes of reparation or restitution, or as a result of the state of war' — i.e., as a consequence of World War II —, without ensuring any compensation for the loss of that property to its owners, and to the detriment of Liechtenstein itself". The Application invoked, as a basis for the Court's jurisdiction, Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957.

By an Order of 28 June 2001, the Court fixed 28 March 2002 and 27 December 2002 as the time-limits for the filing, respectively, of a Memorial by Liechtenstein and of a Counter-Memorial by Germany. Liechtenstein filed its Memorial within the time-limit.

Within the time-limit as fixed for the filing of the Counter-Memorial, Germany filed certain preliminary objections to jurisdiction and admissibility, pursuant to Article 79, paragraph 1, of the Rules of Court. Consequently, by an Order dated 12 July 2002, the President of the Court noted that, by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, and fixed 15 November 2002 as the time-limit within which Liechtenstein might present a written statement of its observations and submissions on the preliminary objection raised by Germany.

Within the time-limit thus fixed, Liechtenstein presented such a statement and the case became ready for hearing with respect to the preliminary objections.

In the light of the Court's judicial workload, the date for the opening of the oral proceedings, originally scheduled for September 2003, was eventually fixed, after consultations with the Parties, at 14 June 2004.

The Court has decided, in accordance with Article 53, paragraph 2, of the Rules of Court, and having consulted the Parties, that copies of the pleadings in the case and the documents annexed will be made accessible to the public on the opening of the oral proceedings. Furthermore, in accordance with the Court's practice, these pleadings without their annexes will from today be put on the Court's Internet site.

I note the presence at the hearing of the Agents, counsel and advocates of both Parties. In accordance with the arrangements on the organization of the procedure decided by the Court after consulting the Parties, the hearings will comprise a first and a second round of oral argument. Each Party will have one full session of three hours for the first round and a session of one-and-a-half hours for the second round.

Germany will present its first round of oral argument on its preliminary objections this morning. Liechtenstein will present its first round of oral argument on the preliminary objections of Germany on Wednesday 16 June at 10 a.m.

Germany will then present its oral reply on Thursday 17 June at 10 a.m., for a speaking time of one-and-a-half hours. Liechtenstein will then present its oral reply on Friday 18 June at 10 a.m., for a speaking time of one-and-a-half hours.

Thus, I shall now give the floor to Mr. Thomas Läufer, Agent of Germany.

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Mr. LÄUFER:

A. Introduction

1. Mr. President, distinguished Members of the Court, it is indeed an honour for me to appear before this Court once again as Agent for the Federal Republic of Germany, this time in a case brought against my country by the Principality of Liechtenstein. My team and I appear today to ask the Court to dismiss Liechtenstein's Application at the preliminary stage.

2. With your permission, I should like to introduce our legal team: Ambassador Duckwitz as Co-Agent; Professor Frowein, Professor Tomuschat and Professor Dupuy as Counsel and Professor Khan, Mr. Paulus, Mrs. Oellers-Frahm, Mrs. Wasum-Rainer and Mr. Hassenpflug as Advisers.

3. Allow me first to express my high esteem for the honourable Members of this Court. I would also like to offer my personal congratulations and those of my Government to Sir Franklin Berman and Professor Carl-August Fleischhauer on their appointment as *ad hoc* judges for this case.

Let me also thank you, Mr. President, and the Members of the Court for the flexibility you have shown in making the arrangements for the date of these hearings. We are aware that the time constraints were not easy for the Court to meet.

4. Mr. President, let me begin the pleadings by underlining the excellent relations between the Federal Republic of Germany and the Principality of Liechtenstein that have existed for over 50 years now. Our two countries share and pursue common goals in various important international organizations. Both countries are committed to the rule of law, to the protection of

fundamental rights and to the peaceful settlement of international disputes. However, in the present case, Germany cannot but strongly contest the jurisdiction of the Court and the admissibility of the Application lodged by Liechtenstein.

5. Mr. President, Members of the Court, I can assure you that I have carefully studied the Liechtenstein Memorial and the Observations more than once. However, I must frankly admit that I am still not able to grasp the gist of the whole Application. In particular, I am still at a loss as regards the international legal basis on which Liechtenstein wishes to rest its claims against Germany. We will show that the Court should reject Liechtenstein's claims for lack of jurisdiction and admissibility. Indeed we do not believe that Liechtenstein deserves yet another chance to present a coherent case when it has failed to do so in its Application, its Memorial and its Written Observations.

6. Germany's Objections are of an exclusively preliminary character, as required by Article 79 of the Rules of Court. We only refer to questions which must be decided before the case reaches the merits stage. Germany will thereby rely on objections which are well established in the case law of this Court.

7. Our Preliminary Objections were filed in written form, as required, and we shall be referring to them and to the annexes in the course of our oral submissions today. We will refer to our written pleadings as "Germany's Preliminary Objections" and to Liechtenstein's response as "Liechtenstein's Observations". To save the Court's time, we also intend not to spell out in full the references to all authorities or documents we refer to or quote from, but to include them instead in the written text handed in to the Registrar. For the convenience of the Court we have provided a folder which contains copies of those documents which we deem to be of particular interest for this case in the oral pleadings.

Facts

8. May I, Mr. President, begin with the presentation of the factual background to this case, both because it is essential to the proper understanding of the issues before the Court and because of the nature of the allegations made by Liechtenstein in its Application, which strike us as rather strange. I refer in particular to the alleged "change of position" by Germany on the Czechoslovak

confiscations in the aftermath of the Second World War and to the alleged "enrichment" of Germany ensuing from the alleged change of position. Needless to say, Mr. President, distinguished Members of the Court, Germany is perfectly prepared to reject these baseless allegations on the merits. However, as Germany will show, this case must already be disposed of at the preliminary stage.

9. Mr. President, this case starts from and centres on the deprivation of all persons of German and Hungarian origin or ethnicity of their assets by the then Czechoslovakia in the immediate aftermath of the Second World War. The confiscation of these assets, which was based on the Beneš decrees of 1945, has never been compensated for by Czechoslovakia. This discriminatory régime of confiscation was also applied to Liechtenstein citizens. Liechtenstein is seeking relief for those measures from the Court.

10. Germany has never recognized the lawfulness of the relevant Czechoslovak measures at any point in time. Germany's legal position as to the confiscations based on the Beneš decrees and executed in the context of the forcible transfer of populations has not changed. These acts — in our view, a view no doubt shared by Liechtenstein — were contrary to public international law.

11. Germany, and in particular its courts, did not however have the opportunity to pass judgment on the status of the Liechtenstein assets until, by mere chance, in the 1990s, the *Pieter van Laer Painting* case was brought before them. Furthermore, and what is more important, the German courts did not have jurisdiction to consider the status of the assets in a way that would amount to the taking of a position as alleged by Liechtenstein. As we will show, this lack of jurisdiction is a direct result of the special legal régime in force after World War II which was based on binding international agreements between Germany and the Western Allied Powers, namely France, the United Kingdom and the United States of America. Thus, the alleged "change of position" has never taken place. It is an artificial construct of Liechtenstein's own making.

12. Liechtenstein claims that agricultural land, numerous buildings, factories and other assets of about 38 Liechtenstein nationals were affected by the confiscation measures taken by Czechoslovakia. In the list annexed to its Observations, Liechtenstein purports to show that most of these confiscations involved properties belonging to the Prince of Liechtenstein and his family.

However, it remains unclear to what extent other Liechtenstein nationals were affected. Most of the relevant property rights are referred to as assets or shares without any further specification.

13. Liechtenstein did not explain whether any of the other property owners have brought any legal action before Czechoslovak courts nor did it explain to what extent it has exercised diplomatic protection on behalf of Liechtenstein nationals. In particular, Liechtenstein has not informed Germany about any contacts with the Governments of Czechoslovakia or the Czech Republic in that regard.

14. I should like to repeat for the sake of emphasis that Germany has never recognized the confiscations of property by the Beneš decrees as lawful. However, due to the Settlement Convention, no claim in connection with measures against property "seized for the purpose of reparation or restitution, or as a result of the war" is admissible before German courts.

15. This was first stated in Law No. 63 Clarifying the Status of German External Assets and Other Property Taken by Way of Reparation or Restitution of 31 August 1951 enacted by the Council of the Allied High Commission for Germany during the occupation of Germany after 1945. The same stipulation was later included in Article 3, Chapter 6, of the Convention on the Settlement of Matters Arising out of the War and the Occupation, in short, the "Settlement Convention", which entered into force on 5 May 1955. The Convention was concluded the very day Germany regained, pursuant to Article 1, paragraph 2, of the Convention on Relations between the Three Powers and the Federal Republic of Germany[1], "the full authority of a sovereign State over its internal and external affairs". In other words, the restoration of sovereignty was predicated upon acceptance of the Settlement Convention.

16. Article 3 of Chapter 6 of the Settlement Convention provides, *inter alia*, in paragraph 1 that "the Federal Republic shall in the future raise no objections against the measures which have been, or will be carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war". Paragraph 3 contains a bar to the jurisdiction of German courts: "No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in

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[1] United Nations, *Treaty Series*, Vol. 332, p. 219.

paragraph 1 . . ." Let me emphasize that this provision has been in force since 1955 and was duly published in the United Nations *Treaty Series*.

17. As Germany explains in greater detail in its Preliminary Objections, German courts have consistently held that they are barred by the Settlement Convention from adjudicating on the lawfulness of any confiscation measures taken for the purposes named by the Settlement Convention[2]. The German courts are bound to apply Article 3, Chapter 6, of the Settlement Convention and are prevented from exercising jurisdiction with respect to assets "seized for the purpose of reparation or restitution, or as a result of the war". Germany never treated confiscated Liechtenstein property as "German", as Liechtenstein falsely claims in its Observations[3]. Germany was however obliged, in order to regain a position as a sovereign State, to promise in the Settlement Convention that it would not sit in judgment over past confiscations. This is a fundamental difference, and Germany emphatically objects to the misrepresentation of its position by Liechtenstein. Besides, Liechtenstein knew of this situation, and did not raise any objection in this respect in the 40 years following the conclusion of the Settlement Convention. Even if it may have misunderstood the German internal case law, as it claims, Liechtenstein cannot now misrepresent its alleged new understanding of the German position as a change of the position itself. Once again, Liechtenstein is obscuring the facts and constructing an artificial case.

18. I would now like to turn to the case concerning the *Pieter van Laer Painting* which is, in the opinion of Germany, the centrepiece of the present proceedings. In 1991 the painting was brought from the Czech city of Brno (Brünn) to the German city of Cologne where it was displayed in an art exhibition in 1991. The Prince of Liechtenstein thereupon claimed the painting as his property and began court proceedings against the City of Cologne.

19. Let me briefly summarize the outcome of those proceedings which was described in our Preliminary Objections in more detail. On 10 October 1995 the Cologne Regional Court declared the plaintiff's action inadmissible. In the court's view, Article 3 of Chapter 6 of the Settlement Convention excluded the jurisdiction of German courts in this case.

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[2] *AKU* case, 23 *ILR*, pp. 22-23 (1956), Preliminary Objections of Germany (POG), Ann. 2; 32 BGHZ, pp. 172 ff. (1960); see the English translation provided in POG, Ann. 3. See also POG, para. 21.

[3] Objections of Liechtenstein (OL), para. 12.

On 9 July 1996, the Cologne Court of Appeal dismissed the plaintiff's appeal. The Court confirmed that Article 3 of Chapter 6 of the Settlement Convention prevented German courts from exercising jurisdiction over the plaintiff's claim.

On 29 January 1998 the Federal Constitutional Court refused to entertain the plaintiff's constitutional complaint. None of the tribunals dealt with the merits of the case.

20. After all the appeals by the Prince of Liechtenstein in the *Pieter van Laer Painting* case had been rejected by the courts, the Principality of Liechtenstein requested consultations with the German Government. Given the friendly relations between the two countries, Germany declared itself ready to hold such consultations. Two rounds of talks took place, on 10 July 1998 and on 14 June 1999. They were of a purely consultative character and did not result in any change of position by Germany — and, as I would like to stress again, could not result in any such change.

21. On 28 July 2001, the European Court of Human Rights unanimously rejected the application by the Prince of Liechtenstein alleging a violation of the European Convention on Human Rights by the decisions of the German courts. The European Court found that no violation of this Convention had taken place. Neither Article 6 of the Convention, which guarantees effective access to court, nor Article 1 of Protocol No. 1, which guarantees the right to property, had been violated. You will find the complete text of the judgment in the folder before you.

22. As to the alleged violation of the right to effective access to court, the European Court unanimously held, and I quote with your permission, Mr. President,

> "The exclusion of German jurisdiction under Chapter 6, Article 3 of the Settlement Convention is a consequence of the particular status of Germany under public international law after the Second World War. It was only as a result of the 1954 Paris Agreements with regard to the Federal Republic of Germany and the Treaty on the Final Settlement with respect to Germany of 1990 that the Federal Republic secured the end of the Occupation Regime and obtained the authority of a sovereign State over its internal and external affairs for a united Germany. In these unique circumstances, the limitation on access to a German court, as a consequence of the Settlement Convention, had a legitimate objective."

Monsieur le président, Madame et Messieurs les juges de la Cour,

23. C'est sur la base de ces faits que l'Allemagne présente ses exceptions préliminaires, qui peuvent être résumées comme suit : nous prions la Cour de dire et juger que cette affaire ne relève pas de sa compétence et que, en outre, les demandes déposées contre l'Allemagne par la

Principauté de Liechtenstein sont irrecevables. L'Allemagne propose respectueusement que les demandes du Liechtenstein soient rejetées *a limine* par la Cour.

24. Monsieur le président, dans le cadre de notre première exception, je vais démontrer que le Liechtenstein n'a pas été en mesure d'établir l'existence d'un différend entre les Parties. Cette affaire concerne la confiscation des biens du Liechtenstein en vertu des décrets Beneš de 1945 dans l'ancienne Tchécoslovaquie. Il s'agit d'une question opposant le Liechtenstein à la République tchèque, Etat ayant succédé à la Tchécoslovaquie. Nous sommes d'avis que les demandes du Liechtenstein ne satisfont pas aux conditions requises pour parler de différend vis-à-vis de l'Allemagne. Cependant, pour des raisons de commodité, nous désignerons cette affaire par le terme de différend dans la suite de nos plaidoiries.

25. Les deux exceptions suivantes concernent la compétence de la Cour.

26. Le professeur Frowein démontrera, dans notre deuxième exception, que la convention européenne pour le règlement pacifique des différends du 29 avril 1957, en vigueur depuis 1980 pour les Parties, ne constitue pas une base de compétence dans cette affaire. Le différend allégué se rapporte intégralement à des faits et des situations juridiques remontant à 1945 et s'est produit immédiatement après.

27. Ensuite, le professeur Frowein présentera notre troisième exception selon laquelle le Liechtenstein n'a pas été en mesure d'évoquer une seule règle pertinente de droit international qui aurait été enfreinte par les tribunaux allemands au cours de leur raisonnement dans l'affaire *Pieter van Laer*. Par conséquent, nous allons montrer que le différend, s'il existe, relève uniquement de la compétence exclusive de l'Allemagne.

28. Monsieur le président, afin de démontrer l'irrecevabilité des demandes du Liechtenstein, nous allons présenter trois exceptions supplémentaires.

29. Le professeur Tomuschat démontrera dans notre quatrième exception préliminaire que le Liechtenstein n'a, en fait, jamais établi ses réclamations comme l'exige l'article 40, paragraphe 1, deuxième phrase du Statut de la Cour. Le Liechtenstein n'a pas démontré son affirmation selon laquelle l'Allemagne a engagé sa responsabilité en raison d'un fait illicite au plan international; il n'a pas indiqué quels ressortissants du Liechtenstein sont touchés ni dans quelle mesure; il n'a pas expliqué de quelle manière l'Allemagne aurait pu inclure les biens des ressortissants du

Liechtenstein dans un programme de réparation; il n'a pas indiqué comment les droits du Liechtenstein auraient pu être enfreints dans le cadre du droit international public par un prétendu changement de position.

30. Monsieur le président, par la suite, le professeur Dupuy démontrera pourquoi cette Cour devrait refuser l'appel du Liechtenstein à porter un jugement sur des actes souverains de la Tchécoslovaquie en l'absence et sans le consentement de celle-ci ni de l'un des Etats qui lui ont succédé. Comme le montrera le professeur Dupuy, il est solidement ancré dans la jurisprudence de cette Cour, que celle-ci n'est pas compétente pour se prononcer sur des actes souverains d'un Etat tiers en l'absence de celui-ci. Dans cette affaire, la présence de la République tchèque, Etat ayant succédé à l'ancienne Tchécoslovaquie, est une condition essentielle pour la recevabilité des requêtes devant cette Cour.

31. Enfin, le professeur Tomuschat conclura notre plaidoirie en montrant que les victimes alléguées du Liechtenstein n'ont pas épuisé tous les recours internes, condition nécessaire pour saisir la Cour.

32. Tous ces points constituent des exceptions d'un caractère essentiellement préliminaire, au sens de l'article 79 du Règlement, et nous prions respectueusement la Cour de rejeter la requête du Liechtenstein.

Remarques générales

33. Monsieur le président, avant d'expliquer que le différend dont cette Cour a été saisie n'existe pas entre les Parties, permettez-moi de commenter brièvement quelques remarques générales faites par le Liechtenstein lors de l'introduction de ses observations.

34. Le Liechtenstein prétend que l'Allemagne tente de s'abriter derrière la République tchèque et de porter un autre différend devant cette Cour. Cette allégation est fausse. L'Allemagne affirme qu'il n'y a qu'un seul différend au cœur de cette affaire, résultant des mesures de confiscation prises par l'ancienne Tchécoslovaquie. Il existe effectivement un différend, n'opposant pas le Liechtenstein à l'Allemagne mais bien le Liechtenstein à voire deux tierces parties aujourd'hui absentes, à savoir les Etats ayant succédé à la Tchécoslovaquie et en particulier la République tchèque.

35. Le Liechtenstein a fait référence à maintes reprises à ses droits d'Etat neutre que l'Allemagne aurait enfreints. Cette référence répétée à son statut de neutralité durant la seconde guerre mondiale n'est autre qu'un indice supplémentaire selon lequel les faits que cette Cour est priée d'examiner sont clairement antérieurs au 18 février 1980, date à laquelle la convention européenne pour le règlement pacifique des différends est entrée en vigueur pour les deux Parties. Cette convention est la seule base de compétence concevable de cette Cour.

36. Le Liechtenstein prétend qu'après les décisions prises par les tribunaux allemands au sujet du tableau de Pieter van Laer, tous les avoirs confisqués appartenant à des citoyens du Liechtenstein, et se trouvant à présent en Allemagne, risquaient d'être exclus de toute voie de recours judiciaire en Allemagne. Cependant, le demandeur n'a pas démontré que des avoirs autres que le tableau de Pieter van Laer soient concernés. La Cour européenne des droits de l'homme a confirmé les jugements des tribunaux allemands dans l'affaire *Pieter van Laer* et a statué qu'aucune violation de garanties judiciaires et de droits de propriété n'avait eu lieu. En réalité, le Liechtenstein souhaite une revision de ces jugements, y compris de celui de la Cour européenne des droits de l'homme.

37. Nous avons clairement démontré qu'un changement de position relatif au statut des avoirs confisqués du Liechtenstein, comme cet Etat le prétend, n'avait jamais eu lieu. L'Allemagne n'a jamais reconnu la légalité de l'expropriation des avoirs du Liechtenstein. En outre, les tribunaux allemands ont appliqué correctement une disposition d'un traité ayant force obligatoire et excluant l'affaire du *Tableau de maître Pieter van Laer* de leur juridiction, mais les tribunaux allemands ne se sont jamais prononcés sur le statut légal du tableau ni d'aucun autre avoir du Liechtenstein situé en République tchèque ou en République slovaque. Pour ces raisons, nous affirmons que le Liechtenstein a grossièrement dénaturé les faits dans cette affaire.

38. Monsieur le président, Madame et Messieurs les juges de la Cour, le Liechtenstein soutient que nous avons déjà présenté des arguments qui devraient intervenir dans la phase de procédure sur le fond. Mais de cette façon, le Liechtenstein masque le réel problème de sa demande : l'absence d'une quelconque base juridique concevable sur laquelle s'appuieraient ses requêtes. Le Liechtenstein se réfère plutôt à de vastes principes tels que la souveraineté, la neutralité ou l'enrichissement indu. Mais il n'est pas parvenu à citer, voire même à expliciter,

quelque obligation juridique spécifique qui engagerait l'Allemagne envers le Liechtenstein et que l'Allemagne aurait enfreinte, ou encore quelque droit spécifique du Liechtenstein à recevoir une compensation. L'Allemagne propose que la Cour n'autorise pas un Etat à lui présenter des requêtes vides de substance, tentant d'entraîner l'autre partie — et cette Cour — dans de longues argumentations lors de la procédure sur le fond. La Cour n'a nul besoin d'attendre la procédure sur le fond pour rejeter ces demandes sans fondement. Lors de cette procédure orale, l'Allemagne va démontrer qu'elles doivent être refusées dès le début pour cause d'incompétence et d'irrecevabilité.

J'exposerai à présent la première exception préliminaire soulevée par la République fédérale d'Allemagne.

B. Première exception préliminaire : pas de différend

39. Si vous le permettez, Monsieur le président, j'aimerais à présent démontrer que l'affaire à laquelle vous-même et les distingués membres de la Cour êtes confrontés ne constitue pas un différend au sens où l'entend la jurisprudence de cette Cour et de celle qui lui a précédée.

40. L'existence d'un «différend» doit être considérée comme l'une des conditions les plus fondamentales pour établir la compétence de cette Cour entre des Etats. La Cour permanente a défini un différend comme «un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts entre deux personnes»[4]. En l'absence d'un tel «différend», la Cour est incapable d'exercer ses fonctions dans une procédure contentieuse. Ce principe a été souligné à maintes reprises dans la jurisprudence de la Cour. Comme cette Cour l'a indiqué dans les affaires des *Essais nucléaires*, «l'existence d'un différend est donc la condition première de l'exercice de sa fonction judiciaire»[5].

41. Cette Cour a toujours précisé que pour qu'elle soit compétente, il faut qu'il existe un vrai différend entre les parties. Permettez-moi de citer un extrait de l'arrêt de cette Cour dans l'affaire relative à la *Compétence en matière de pêcheries* : «Il incombe à la Cour, tout en consacrant une attention particulière à la formulation du différend utilisée par le demandeur, de définir elle-même.

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[4] *Concessions Mavrommatis en Palestine, C.P.J.I. série A n° 2*, p. 11.

[5] *Essais nucléaires (Australie c. France), C.I.J. Recueil 1974*, p. 271, par. 55. *Essais nucléaires (Nouvelle-Zélande c. France), C.I.J. Recueil 1974*, p. 476, par. 58.

sur une base objective, le différend qui oppose les parties, en examinant la position de l'une et de l'autre »[6]

42. Nous sommes heureux que le Liechtenstein, dans ses observations, se réfère aux mêmes principes juridiques régissant cette question. Cependant, il en tire les conclusions erronées. D'un point de vue objectif, on ne peut déceler aucun désaccord sur un point de droit ou de fait entre l'Allemagne et le Liechtenstein. Les deux Parties s'entendent sur le fait que les avoirs du Liechtenstein n'ont pas été confisqués par l'Allemagne. L'Allemagne n'a jamais reconnu la légitimité des mesures de confiscation de la Tchécoslovaquie, ni avant ni après 1995. Le changement de position allégué, qui aurait dû mener à un désaccord sur un point de droit, n'a jamais eu lieu, et n'aurait pu en aucune façon affecter la situation juridique des prétendus droits de propriété du Liechtenstein en République tchèque.

43. Monsieur le président, nous remarquons avec un intérêt considérable que le Liechtenstein a désormais confirmé de façon univoque qu'un différend l'oppose à la République tchèque au sujet des expropriations à la suite de la seconde guerre mondiale[7]. La confusion entre les différentes demandes du Liechtenstein est l'œuvre exclusive de cet Etat — en effet, l'Allemagne soutient que le Liechtenstein ne peut atteindre ses objectifs qu'en dissimulant la véritable nature de ses demandes. Nous affirmons qu'il est impossible de formuler le prétendu différend du Liechtenstein avec l'Allemagne d'une façon qui parvienne vraiment à le distinguer du différend véritable qui l'oppose à la République tchèque. Il sera difficile de réfuter l'impression que le Liechtenstein recherche désespérément un destinataire à qui présenter ses demandes de compensation et poursuit par conséquent une stratégie de forum shopping.

44. De toute façon, comme le professeur Dupuy le démontrera ensuite dans nos plaidoiries concernant la présence indispensable de la République tchèque lors de ces audiences, il est impossible d'apprécier les demandes du Liechtenstein sans se prononcer sur les droits et obligations d'un Etat absent, la République tchèque.

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[6] *Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998,* p. 432, p. 448, par. 30.

[7] Observations du Liechtenstein, par. 8, 1.12.

45. Monsieur le président, je remercie la Cour de l'attention qu'elle a accordée à mes quelques mots d'introduction. A présent, je prie la Cour de bien vouloir accorder la parole au professeur Frowein, qui va tout d'abord présenter l'argumentation de l'Allemagne au sujet de l'absence de compétence temporelle dans cette affaire.

The PRESIDENT: Thank you, Mr. Läufer. I now give the floor to Professor Frowein.

Mr. FROWEIN:

C. Second Preliminary Objection: lack of jurisdiction *ratione temporis*

Introduction

46. Mr. President, honourable judges of the International Court of Justice, it is a great honour and a personal pleasure for me to appear for the first time before this Court. I appear in the case brought by the Principality of Liechtenstein against the Federal Republic of Germany concerning certain properties, which might also be called case concerning "uncertain properties". It is a case where Germany will now assume that a dispute exists. It is a strange one indeed. It concerns a change of attitude which Germany denies. The legal attitude which Germany is alleged to have changed concerns Germany's position vis-à-vis confiscations by Czechoslovakia in 1945 which Germany could not hinder and for which Germany bears no responsibility whatsoever. Liechtenstein has not been able to tell us what factual or legal consequences could have resulted from that alleged change of attitude for property under the jurisdiction of the Czech Republic, now a Member State of the European Union.

47. Let me start by quoting again Article 27, paragraph *(a)*, of the European Convention for the Peaceful Settlement of Disputes, which is the basis for jurisdiction here: "The provisions of this Convention shall not apply to: *(a)* disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute."[8]

48. The Convention entered into force between the Parties on 18 February 1980. The crucial issue is, therefore, not when the dispute arose, but whether the dispute *relates* to facts or situations before or after 18 February 1980. Liechtenstein, in its Observations, frequently stresses that the

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[8] United Nations, *Treaty Series*, Vol. 320, p. 243.

dispute arose in the 1990s. That, however, is quite irrelevant. Only the facts and situations to which the dispute *relates* are decisive for the jurisdiction *ratione temporis* of your Court.

49. A first look at a dispute concerning confiscations in 1945 tells us that it is outside the temporal jurisdiction of the Court, which begins in 1980 as between Liechtenstein and Germany. A closer look confirms this result, as will be shown in detail.

50. Liechtenstein approached Germany for the very first time in 1999, with the proposal to commence negotiations with the objective of reaching just compensation from Germany for properties confiscated by Czechoslovakia. Germany of course refused any compensation. In this sense the allegation of a claim exists which arose after 1980. But it clearly relates to facts and situations dating from 1945 and immediately after.

51. It is quite clear that the dispute has its real source in the confiscations of then Liechtenstein property by Czechoslovakia almost 60 years ago. It is striking that Liechtenstein, to overcome the limitation *ratione temporis*, now tries to reserve the question of a change of position by Germany concerning these confiscations as a matter for the merits.

52. On page 54 of its Observations of 15 November 2002, Liechtenstein argues:

> "For example, it [Germany] asserts that Germany never changed its position after 1955. Liechtenstein disagrees, has specified the changes of position involved, and has shown that they occurred after 1980. That being so, whether there has been such a change of position is a matter for the merits."

If Liechtenstein is right, Mr. President, limitations of the jurisdiction *ratione temporis* have no meaning. By claiming a change of position one may overcome any limitation *ratione temporis*.

53. Let me first address the so-called "common position" of Liechtenstein and Germany. I will then go on to compare this case with others decided by your Court and the Permanent Court and make some additional remarks.

The alleged common position relates to facts outside the temporal jurisdiction

54. Let us look at Liechtenstein's allegation that a common position has been held by Liechtenstein and Germany regarding the confiscations by Czechoslovakia in 1945, but that this was then changed by Germany, thus giving rise to the dispute before the Court. To find out whether Liechtenstein's allegation is correct and could provide the basis for the jurisdiction of the Court, as a dispute relating to facts and situations after 1980, it is important to determine what the

common position of the two Governments could have been and to which facts or situations the common position relates.

55. By carefully evaluating what Liechtenstein implies to be the common position, it will become quite clear that no such common position ever existed and that Liechtenstein is merely trying to circumvent the critical time-limit by first constructing a common position and then constructing a change of that common position after 1980, in order to bring the case under the temporal jurisdiction of the Court. But it will also become clear that even assuming a common position existed, it related solely to facts and situations occurring in 1945 and immediately after that period.

56. First of all let me stress that Germany has never received any official information concerning property of Liechtenstein citizens, which was confiscated on the basis of the Beneš decrees by Czechoslovakia in 1945. In fact, only the Observations by Liechtenstein replying to Germany's Preliminary Objections gave Germany for the very first time information concerning real estate *allegedly* confiscated by Czechoslovakia in 1945 and at that time belonging to Liechtenstein citizens. This information is not at all precise, as you will have seen when you looked at the list. In many cases it is noted that Liechtenstein citizenship is unclear. So, even today, in 2004, Liechtenstein is unable to tell us which property is really at stake.

57. The huge amount of the former Liechtenstein property allegedly confiscated in Czechoslovakia, and now listed in Liechtenstein's Observations, has never been at issue in any German court proceedings or administrative proceedings. How could it be? All this property has been, since 1945, under the territorial sovereignty of Czechoslovakia and now of the Czech Republic — or Slovakia, but mainly the Czech Republic. Germany has never, in any manner, interfered with the territorial sovereignty of Czechoslovakia or the Czech Republic.

58. In fact, Liechtenstein underlines that no German court proceedings concerned former Liechtenstein property — except the one case which I shall of course come to. But Liechtenstein cannot have it both ways. Since no court cases or other German acts have dealt with former Liechtenstein property, it is clear that no "common position" can have existed. Germany was completely unaware that Liechtenstein property had been affected by the sovereign acts of Czechoslovakia. This shows that Germany and Liechtenstein had no common position whatsoever

concerning the confiscation of Liechtenstein property by Czechoslovakia in 1945. But even assuming that they had one, it would not help Liechtenstein because it would relate to facts in 1945.

59. It is of course correct that Germany has always taken the view that the confiscation of German property on the basis of the Beneš decrees was in violation of public international law. This position, however, had nothing to do with the confiscation of Liechtenstein property about which Germany had no information whatsoever.

60. Let me add one consideration, Mr. President. Liechtenstein always speaks of "Liechtenstein property". What is it really? It is property belonging under the laws applied by the territorial sovereign, the Czech Republic, to *Czech* owners, not to Liechtenstein owners and that for more than 50 years — of course, earlier under the laws of Czechoslovakia. German courts have continuously respected the laws applied by the territorial sovereign in these matters. Liechtenstein may well be of the opinion that the property should still be treated as Liechtenstein property. But it has not cited any rule of international law which might create the obligation for Germany to follow that position of Liechtenstein. For Germany the property is owned by the respective Czech owners.

The Pieter van Laer painting story confirms that the dispute is outside the temporal jurisdiction

61. Of course, we know that in 1991, a painting which had been confiscated by Czechoslovakia in 1945 was exhibited in Cologne, whereupon the Prince of Liechtenstein claimed it as his personal property. What was at issue in the case brought before the German courts after the painting was under German territorial jurisdiction: the Prince, acting in his private capacity as a citizen of Liechtenstein, claimed to still be the owner of the painting, which had for more than 50 years been in the peaceful possession of a museum in Czechoslovakia and thereafter the Czech Republic, and the Prince argued as a foreign plaintiff before the German courts that the painting should be returned to him.

62. The painting had been sent to Cologne by a Czech museum which, under Czech law, was and is clearly the owner of the painting. Compared with the real estate now listed in Liechtenstein's Observations, to which I made reference already, the value of the painting is negligible. However, the present dispute only came into being because the German courts found

that they were prevented by the Settlement Convention from looking into the confiscation of the painting which had taken place in 1945. Without the painting story there would be no dispute here, Mr. President.

63. All this clearly shows that Liechtenstein and Germany never shared a common position as concerns either the real estate or the painting. No common position has ever existed, nor has Germany changed its position in any way. But any common position as alleged by Liechtenstein would relate to facts and situations in 1945. This would exclude any dispute about a change of position from the jurisdiction of the Court.

The limitation *ratione temporis* as applied by the Court and the present case

64. As was stated long ago by the Permanent Court, a limitation *ratione temporis*, as included in the European Convention, is intended to preclude the submission to the Court, by means of an application, of situations or facts dating from a period when the State whose action is impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise.

65. This statement, Mr. President, fully covers the present situation. Liechtenstein is now trying to bring before this Court an issue concerning matters of reparation and property confiscated by Czechoslovakia in 1945. The European Convention on the Peaceful Settlement of Disputes excludes disputes relating to facts or situations prior to the entry into force of this Convention as between the parties in 1980.

66. This rule applies here and excludes the dispute from the jurisdiction of the Court. Liechtenstein seems to overlook the fact that the critical date under the jurisdictional clause in the European Convention is not the date when the dispute *arose* but the date or dates of the facts or situations to which the dispute *relates* which is brought before this Court.

67. A comparison with the case law of this Court and of that of the Permanent Court will make it quite clear that the present case is excluded *ratione temporis*.

68. A comparison with the *Passage over Indian Territory* case[9] is quite telling, as Germany has already shown in its Preliminary Objections[10]. In the *Passage* case the important matter was that passage to the enclaves had in fact existed for a very long time. This passage was then interrupted at a time when your Court had jurisdiction *ratione temporis*. You held that the dispute related to the stopping of the passage and that the Court was not prevented from applying the law which had developed long before. The facts to which the dispute related concerned the interruption of the passage.

69. In the present case no practice whatsoever existed. Germany, until the *Pieter van Laer Painting* proceedings, had no information whatsoever concerning the confiscation of Liechtenstein property by Czechoslovakia. Liechtenstein had never approached Germany and Germany had no information concerning Liechtenstein's dealings with Czechoslovakia or later the Czech Republic. For the very first time, after the German court proceedings, Liechtenstein presented its claim for compensation.

70. To overcome the limitation *ratione temporis* Liechtenstein argues that it is a change of Germany's attitude which is decisive for the application of the rule. However, it is the confiscation of the property which is the real source of the dispute, only dressed in a different manner by the Liechtenstein Application.

71. It is also quite telling, I submit, to look at the two other cases where the Permanent Court had to apply a *ratione temporis* limitation.

72. In the *Phosphates in Morocco* case[11] the Court found that it had no jurisdiction concerning acts which were seen as the basis for the dispute by the Italian Government. The Court held that the situation which the Italian Government denounced as unlawful was in fact a legal position resulting from French legislation prior to the entry into force of the French declaration on jurisdiction. According to the Court this legal position could not be considered separately from the legislation of which it was the result and therefore it was outside the jurisdiction of the Court.

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[9] *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6.

[10] POG, Vol. I, §§ 73-80.

[11] *Phosphates in Morocco, Preliminary Objections, Judgment, P.C.I.J. Series A/B, No. 74*, p. 24.

73. In the same way, what Liechtenstein now alleges to be within the jurisdiction of the Court cannot at all be separated, I submit, from the issue of the lawfulness of the confiscations in 1945 and their consequences. Indeed, Liechtenstein seems to imply that Germany was under an obligation to treat these confiscations as a nullity. Of course, this view is completely mistaken. But what is important in our context is that the German position that Liechtenstein tries to describe as a violation of its rights cannot be separated from the issue of confiscations long before the deadline for the jurisdiction. Those confiscations in 1945 are at the centre of the dispute. Therefore, the confiscations are the facts and situations to which the dispute *relates*.

74. In the *Electricity Company of Sofia* case[12] the decisive issue was that both parties had been in clear agreement concerning the binding character of the awards of the Mixed Arbitral Tribunal. In the present case there was no agreement whatsoever among the Parties. As explained earlier, Germany had never received any information concerning the confiscation of Liechtenstein property. Germany never agreed with Liechtenstein in any manner whatsoever. For the first time in 1999 Liechtenstein claimed compensation from Germany for losses which occurred in 1945 due to the confiscations by Czechoslovakia. Again, this shows that the facts to which the dispute relates are outside the temporal jurisdiction of the Court.

75. By the way, Mr. President, Members of the Court, is it not quite telling that Liechtenstein speaks of "losses", while nothing has been lost because of any change of German attitude? Assuming that Liechtenstein is referring to the painting issue, we are again confronted with a complete misunderstanding on the part of Liechtenstein. Leaving aside the issue of the Settlement Convention, German courts would have applied rules of private international law and the international law of confiscations. They would have rejected any claim concerning movable property confiscated more than 50 years ago. The painting was "lost" in 1945. The European Court of Human Rights clearly confirmed that.

The Liechtenstein application as clarified in the new Observations

76. Liechtenstein, alleging that Germany rewrote its Application, now states its main position on page 52 (3.29) of its Observations to be as follows:

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[12] *Electricity Company of Sofia and Bulgaria, Preliminary Objections, Judgment, P.C.I.J., Series A/B, No. 77*, p. 64.

> "For 35 years following the seizure of Liechtenstein property under the Beneš decrees, there was no dispute on that subject between Liechtenstein and Germany. It was only in the 1990s — following the amendment to the Settlement Convention which deleted any reference to compensation — that Germany took the position that the Liechtenstein property could properly be considered German for the purpose of that Convention, i.e., that it was covered by the reparation regime. It was at that point, and not before, that a dispute arose."

77. I must again underline, and it must again be noted that it is of no importance for the jurisdictional rule to be applied here when the dispute *arose*. What is of importance here is to which facts and legal situations the dispute *relates*. Only where these facts or situations are within the temporal jurisdiction, that means happened after 1980, could the Court have jurisdiction. However, it is clear that the dispute which allegedly arose in the 1990s relates to facts and situations long before 1980, namely in 1945 and immediately thereafter.

78. As Liechtenstein repeats several times in its Observations, the subject-matter of the case is a change in the German position "with regard to the inclusion of the confiscated assets into the reparations régime established particularly by the Paris Agreement of 1952" (p. 82 of the Observations, p. 91, p. 103). This statement by Liechtenstein itself clearly demonstrates that the alleged dispute relates to the reparation régime which Liechtenstein itself dates back to 1952, nearly 30 years before the jurisdictional clause of the European Convention entered into force between Liechtenstein and Germany.

79. As already explained in detail Germany did not in any way change its legal position. Liechtenstein, like all other States — I think that can be assumed — was fully aware of the international legal situation of Germany after 1945 and of the fact that Germany was not entitled to review whether confiscations by former Allied Powers, such as Czechoslovakia in that respect, were lawful or not. Indeed, it would have been surprising if the Powers occupying Germany had permitted German courts and authorities to review such confiscations.

80. Liechtenstein also tries to create the impression that the deletion of any reference to compensation in the Settlement Convention by the 1990 agreements in the context of German reunification could have been of importance for Liechtenstein citizens. This, however, again, is completely misleading. What Liechtenstein is referring to here is the Exchange of Notes which took place between Germany on the one hand, and France, the United Kingdom and the United States, on the other, concerning the Settlement Convention. This Exchange of Notes occurred in the

context of the German reunification. And it is correct that by this Exchange most parts of the Settlement Convention were abrogated, including the reference to compensation contained therein.

81. However, it is quite misleading to imply in that context that the compensation provision in the Settlement Convention could have applied to Liechtenstein citizens for confiscations based on the Beneš decrees. This is obvious from the wording of the German legislation concerning compensation for reparation damages which Liechtenstein has been familiar with all along. Between 1945 and 1999 Liechtenstein did not once argue that Germany should compensate Liechtenstein citizens for the confiscation of their property by Czechoslovakia.

Comparison of Liechtenstein's attitude with that of Switzerland

82. It seems useful to compare Liechtenstein's situation with that of Switzerland. Unfortunately, also Swiss property was confiscated by Czechoslovakia on the basis of the Beneš decrees. That immediately led to reactions by Switzerland. Switzerland concluded a number of agreements with Czechoslovakia on the basis of which compensation had to be paid for all Swiss property confiscated in that context. The agreements are published in the Swiss *Treaty* Series.

83. Liechtenstein never concluded any such agreement. This inactivity by Liechtenstein shows what the real issue is in the present context. When, completely by accident, a painting confiscated by Czechoslovakia in 1945 comes into Germany, Liechtenstein argues that Germany should treat that painting as Liechtenstein property. However, Liechtenstein is unable to show that any rule of public international law required Germany to act otherwise than it acted.

84. This comparison with the position of Switzerland also shows the importance of an additional argument already advanced by Germany in its Preliminary Objections. This argument concerns the complete inactivity of Liechtenstein between 1945 and 1995. This inactivity, I submit, would have to be analysed by the Court as to its legal consequences should the case be decided on the merits.

85. The period from 1945 until 1980, a period of 35 years, more than a generation, would be of crucial importance in that context. Since the Court could not judge, I submit, on the inactivity of Liechtenstein during this period — the crucial one — the dispute is not within the jurisdiction of

the Court because it relates to facts and situations prior to the entry into force of the Convention as between the Parties in 1980.

86. Let me repeat: the alleged change of attitude is not a matter for the merits, as Liechtenstein now argues. With that view it would be very easy to circumvent the limitation *ratione temporis* included in the European Convention. The facts and situations to which the dispute relates are those going back to 1945 but not occurring after 1980. They are, therefore, Mr. President, Members of the International Court of Justice, excluded from the jurisdiction of your Court.

With your permission, Mr. President, if that is suitable, I would go on for about ten minutes with our third Preliminary Objection.

The PRESIDENT: Yes, please continue.

Mr. FROWEIN:

D. Third Preliminary Objection: domestic jurisdiction of Germany

87. I come to our third Preliminary Objection which concerns the domestic jurisdiction issue. Mr. President, Members of the Court, Germany has argued that the dispute, as alleged by Liechtenstein, if analysed properly, is solely within the domestic jurisdiction of Germany. This Objection is based on Article 27 *(b)* of the European Convention for the Peaceful Settlement of Disputes according to which the Convention shall not apply to "*(b)* disputes concerning questions which by international law are solely within the domestic jurisdiction of States". Let me start with a sentence which I shall repeat. International law — and I think all international lawyers in principle will agree on that — international law is not concerned with the *reasoning* of national courts, it is only concerned with the *results* they reach.

88. Liechtenstein, in its Observations, refuses to answer the main German argument when dealing with the question of domestic jurisdiction. This argument concerns the *Pieter van Laer Painting* case, the case from which the whole dispute, as alleged by Liechtenstein, arose. The *Pieter van Laer Painting* case was a case pending before and decided by German courts between the Prince of Liechtenstein in his private capacity, who claimed to be the owner of the painting and sued as a foreign citizen and, on the other hand, the City of Cologne. The German courts had

jurisdiction because the painting was in Germany and fell under the territorial jurisdiction of Germany.

89. Of course, Germany does not at all deny that international legal issues arose in the context of the case. The German courts applied an international treaty, namely the Settlement Convention concluded with France, the United Kingdom and the United States. In addition the European Convention on Human Rights had to be respected and was respected, as the European Court of Human Rights has held in a unanimous decision binding for the Prince of Liechtenstein, as a private citizen, and for Germany as a State.

90. The case pending before the German courts concerned a painting brought into Germany for an exhibition on the basis of a decision of the Czech museum which, under Czech law, is the owner of the painting. Germany argues that, after the painting was brought into Germany, its territorial jurisdiction fully covered the situation. By deciding that, under the Settlement Convention, German courts were not entitled to review the confiscation but had to respect the ownership of the Czech museum, the courts did nothing which could interfere with any rights of Liechtenstein.

91. The fact that a specific treaty, namely the Settlement Convention, concluded between Germany and the three Allied Powers, prevented German courts from looking into the lawfulness of the confiscations, has nothing to do with any position under public international law on which Liechtenstein could rely. Liechtenstein had no position under public international law concerning movable property confiscated by the territorial sovereign, i.e., at that time Czechoslovakia, more than 50 years ago and brought into Germany in 1991. Liechtenstein refuses to show us what rule of international law should have been respected by the German courts in favour of Liechtenstein.

92. As far as the real estate to which Liechtenstein also refers is concerned, one thing is of course quite obvious. This property is fully and solely under the territorial sovereignty of the Czech Republic. It is evident that any German decision concerning that property must only respect Czech sovereignty. In its relations with Liechtenstein this is a matter solely within the domestic jurisdiction of Germany. Liechtenstein has not even indicated any rule of international law which Germany should have had to apply when dealing with real estate situated in the Czech Republic and, more than 50 years ago, allegedly owned by Liechtenstein citizens.

93. For obvious reasons Liechtenstein does not refer to Germany's argument that matters concerning the treatment of confiscated property are, as such, not directly regulated by international law, if no treaties or other rules provide otherwise. Even where the confiscation was in violation of international law there is no rule of international law automatically applicable for the treatment of that property in the forum of any State. International law protects foreign property and guarantees, at least in principle, a right to compensation. But it is silent as to obligations of third States in relation to confiscated property. This is shown by the practice of States and the doctrine of international law as explained in the German Preliminary Objections with quotations, among others, by Professor Pellet.

94. Liechtenstein, on purpose, refuses to answer the German argument that the outcome of the German court proceedings would have been exactly the same even if the Settlement Convention did not exist. The then applicable rules of private international law and confiscation law, as applied and recognized in Germany, as in so many other countries in the world, would have had exactly the same result, as shown in the German Preliminary Objections. The painting found on German territory for the exhibition would have been returned to the owner according to Czech law, the museum, because Czechoslovakian and now Czech law have governed the law of property for that painting for the last 50 years. Exactly that happened here. That would not have interfered with any rights of Liechtenstein as a subject of international law.

95. International law, and I repeat what I said, is not concerned with the reasoning of municipal courts. It is concerned with the result of their decisions. Since Liechtenstein does not and cannot argue that the result could be in violation of any of its rights, it recognizes, I submit, that the decisions of the German courts, as to their results, were not a matter of international law. This in itself demonstrates that, as far as Liechtenstein is concerned, the matter was solely within the domestic jurisdiction of Germany.

96. The attitude of Liechtenstein, which avoids the crucial issue, becomes blatantly obvious in No. 2.19 of its Observations on page 34. Here Liechtenstein does not hesitate to say that Germany was not entitled to treat the Liechtenstein property as coming within the scope of the Settlement Convention and that Germany has to pay compensation for the loss of that property in 1945. This would of course be a matter for the merits.

97. However, the issue that Liechtenstein fails to address is this: was Germany under any public international law obligation vis-à-vis Liechtenstein to transfer the painting to a Liechtenstein citizen, who happens to be the Prince of Liechtenstein but, of course, acts in his private capacity, or not? Of course, international law does not contain any rule creating such an obligation for Germany. Liechtenstein knows that quite well. Since international law is not even invoked by Liechtenstein as regards the result of the proceedings, Liechtenstein implicitly recognizes that this result is fully within the domestic jurisdiction of Germany.

98. Liechtenstein advances one further argument. It states that the *Monetary Gold* principle, as invoked by Germany — the indispensable third party, which will be presented in detail by our colleague and friend Pierre-Marie Dupuy — shows that the case cannot be solely within the domestic jurisdiction of Germany. But this is a complete misinterpretation of Germany's position. *Monetary Gold* is only advanced because the Liechtenstein argument presupposes that the lawfulness, under international law, of Czechoslovakian measures of confiscation will be judged by the Court. However, that can only be done in the presence of the successor State to Czechoslovakia, which is the Czech Republic.

99. The argument that the Czech Republic is an indispensable third party for any judicial finding on the confiscations by Czechoslovakia in 1945 is completely unrelated, I submit, to the German argument on the German court cases and the German position that real estate in the Czech Republic is only governed by Czech law. Therefore, Germany respectfully submits that the questions put before this Court, as raised by Liechtenstein, are solely within the domestic jurisdiction of Germany.

Mr. President, judges of the Court, thank you for your kind attention. I wonder whether it would now be suitable to have the usual short break. After the break, with your permission, Mr. President, my colleague and friend Professor Tomuschat, will continue the German argument. Thank you for your kind attention.

The PRESIDENT: Thank you, Professor Frowein. The hearing is suspended for ten minutes, after which I shall give the floor to Professor Tomuschat.

The Court adjourned from 11.25 a.m. to 11.40 a.m.

The PRESIDENT: Please be seated. Professor Tomuschat you have the floor.

Mr. TOMUSCHAT:

E. Fourth Preliminary Objection: Liechtenstein's claims are not sufficiently substantiated

Summary of the argument

100. Mr. President, distinguished Members of the Court, another ground on which Germany objects to the admissibility of Liechtenstein's Application is the definite and incurable lack of substantiation of the submissions presented by Liechtenstein. Germany has set out this defence as the fourth of its Preliminary Objections. In its Observations of 15 November 2002, Liechtenstein has attempted to reject this objection as unfounded. But a close reading of the Observations reveals that up to this very moment the Application is tainted by such profound flaws that the minimal requirements set out in Article 40, paragraph 1, second sentence of the Statute of the Court and in more detail in Article 38, paragraph 2, of the Rules of Court, cannot be deemed to have been met. These requirements are no mere formality. They are designed to ensure that the Respondent is provided with sufficient information to enable it to organize its defence. Up to this very day, however, this information has not been forthcoming.

101. In fact, it is submitted that the Applicant has failed sufficiently to substantiate its contention that Germany has incurred responsibility on account of an internationally wrongful act. Liechtenstein responds to this criticism by insisting that it has complied with the obligations incumbent upon it not just under the Rules, but essentially under the Statute of the Court itself. However, a perusal of its Observations just yields the same results as the original Application, even as supplemented by the Memorial of 28 March 2002. There is no indication whatsoever that sheds any light on any alleged misconduct by Germany.

No substantiation of the blanket allegation that Germany has interfered with Liechtenstein assets

102. Even the most meticulous examination of the Observations fails to reveal anything that might indicate what the Federal Republic of Germany may have done to be held responsible for the financial losses suffered by Liechtenstein in 1945 at the hands of the Czechoslovak authorities. Liechtenstein deliberately confines itself to a vague formula which lacks any tangible substance. In

paragraph 4.7 of the Observations, the Respondent makes an assertion which, according to it, constitutes the pivotal element of the entire case. I quote:

> "the inclusion of Liechtenstein's assets under the reparations scheme as a result of the decisions of the German courts, subsequently endorsed by the German authorities, during the 1990s, is the cornerstone of the present dispute and constitutes the (complex) internationally wrongful act that Liechtenstein complains of".

A similar statement can be found in paragraph 4.23 of the Observations. Beyond this argument, which explains nothing, there is a singular absence of hard facts, only slightly remedied by Annex 49 to the Observations, the List of the Families Affected by the Confiscation Measures of the Czechoslovak Government. We would just like to observe *en passant* that the title of this document is very revealing. Indeed, the families who lost their properties were the victims of measures taken by the Czechoslovak authorities — and have remained adversely affected by these measures up to the present time. In this regard, Germany entirely agrees with the Applicant.

103. The reader knows only one thing for sure, namely that Czechoslovakia confiscated Liechtenstein properties back in 1945, but he finds no clues whatsoever in Liechtenstein's pleadings which might indicate that in the 1990s Germany, as contended by Liechtenstein, either approved of these confiscations, enriched itself by counting them as German properties, or derived any other benefit from them. In other words, what is totally lacking is the identification of the act or acts allegedly interfering with Liechtenstein properties, as well as the identification of any causal link during the relevant period of time.

The proceedings in the *Painting* case have not altered the status of (former) Liechtenstein assets located in the Czech Republic

104. There is just one event which Liechtenstein refers to again and again, namely the series of German judicial decisions dealing with the suit brought by Prince Hans-Adam II in Germany to recover the Pieter van Laer painting that had been confiscated in Czechoslovakia back in 1945. It portrays these decisions as acts which deprived it of its continuing title to property. In reality, however, as borne out by a careful reading of the judgments of the Cologne Court of Appeal[13] and the Federal Constitutional Court[14], the two decisions confine themselves to stating that no judicial

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[13] Memorial of Liechtenstein (ML), Ann. 29, p. 289.

[14] ML, Ann. 32, p. 353.

action could be brought with respect to the picture before the German courts, because of the relevant provisions of the Settlement Convention[15]. Not a single word is devoted in these decisions to the substantive aspects of the case. Germany did not claim to have any property rights over the painting, nor did the competent courts rule that Czechoslovakia had acquired the property in either a lawful or an unlawful manner. All they did was declare that judicial remedies were not available in Germany, on account of a treaty that had been gently imposed on it by the three Western Allied Powers as part of the price for the recovery of its sovereignty.

"Inclusion in the reparations scheme" is a formula devoid of any substance

105. I now come back to the formula relied upon by Liechtenstein, which has already been referred to. What does it mean: inclusion in the reparations régime? Frankly, Germany is at a complete loss to understand what facts are supposed to lie behind this formula. Liechtenstein is apparently trying to suggest that Germany has paid some of its debts deriving from the Second World War by using assets rightfully belonging to Liechtenstein nationals. But not even the slightest factual allegation is provided to support that contention. A rough overview of the properties and other assets allegedly confiscated by Czechoslovakia was provided for the first time in Annex 49 to Liechtenstein's Observations. This was brand new information as far as Germany is concerned. Germany has never had any direct knowledge of the confiscatory measures taken by the Czechoslovak authorities in 1945 against nationals of third countries, and since that time it has not had the slightest contact with the properties now identified by Liechtenstein. The so-called "change of position", which has never taken place and which in any event just boils down to the fact that no claim for the recovery of Liechtenstein property confiscated in Czechoslovakia may be pursued before German courts, can in no way affect the legal status of the contested real estate located in the Czech Republic and possibly also in Slovakia, and the same is true of the other assets of which a number of Liechtenstein nationals were allegedly deprived.

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[15] ML, Ann. 16, p. 133: Convention on the Settlement of Matters Arising out of the War and the Occupation (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris on 23 October 1954), Chap. 6, Art. 3, para. 3.

The objection pertains to the preliminary stage of the proceedings

106. The objection raised by Germany under the heading "lack of substantiation" has a specifically preliminary character. Germany holds that Liechtenstein has failed to give the essential core facts which would permit at least a prima facie assessment of its claims. It is not aware of any developments, after 1955, in the reparations régime established by the Allied Powers by virtue of the Potsdam Agreement in 1945. On the other hand, Liechtenstein does not even submit that this was the case. The only relevant statement is the blanket formula that the Liechtenstein assets confiscated by Czechoslovakia were included in the reparations régime. This vague assertion is not sustained by any factual allegations. Liechtenstein's Application fails to provide a framework within which both Parties can argue the relevant issues. To date, the case rests on an enigma. What act did Germany perform after the entry into force of the jurisdictional clause between the two States on 18 February 1980 that caused the injury for which Liechtenstein claims reparation?

107. In paragraphs 4.16 and 4.17 of its Observations, Liechtenstein makes an almost desperate attempt to show that it has complied with the requirements of minimal substantiation as required by the Statute and Rules of Court. But it is not enough to refer to the abstract proposition formulated by the Court in the *Northern Cameroons* case[16]. One need only read that Judgment to convince oneself that Cameroon had set out its grievances in great detail. Cameroon, in that case, cited concrete actions by the Respondent, hard facts, and not just a "change of position", which cannot alter a legal position that objectively obtains. Who has ever heard that a State may commit an internationally wrongful act by a "change of position", by a purely internal assessment of a legal issue? The ILC Articles on Responsibility of States for internationally wrongful acts[17], which clearly embody customary international law, stipulate that international responsibility must indeed be based on an "act" (Article 1), which may consist of an "action or omission" (Article 2).

108. To be sure, certain acts can be ascribed to Germany, namely the judicial decisions regarding the Pieter van Laer painting. But it must be emphasized again that Germany has had no contact of any kind whatsoever with the remaining Liechtenstein assets, almost all of which are still

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[16] *Northern Cameroons, Preliminary Objections, I.C.J. Reports 1963*, p. 28.

[17] Taken note of by General Assembly resolution 56/83, 12 December 2001.

today located in the Czech Republic. Germany has performed no act concerning these assets and, as is of even greater relevance for the present stage of Preliminary Objections, Liechtenstein does not even contend that the properties confiscated in 1945 by the Czechoslovak State were adversely affected by an actual, concrete German sovereign act. The alleged "change of position" amounts to no more than a hypothetical speculation. Since German judicial practice, based on the Settlement Convention, does not permit any legal action to be brought before German courts by a person who claims to be the rightful owner of an object forming part of confiscated assets, Liechtenstein apparently feels that these assets were morally downscaled. But such preoccupations have nothing to do with the legal status of these assets, which are totally outside the jurisdiction of Germany. Germany has no intention of arrogating to itself any legal powers or factual control over the assets, and has never done so. It has not included them in any list of assets to be taken into account as compensation for German war debts and has not taken any other measure which might have an adverse effect on them.

109. All of Liechtenstein's submissions centre on the *Pieter van Laer* case. This case certainly took place, it did take place. There is no denying the fact that it was adjudicated by the competent German tribunals and by the European Court of Human Rights. The Strasbourg Court made a formal finding to the effect that Germany, by denying Prince Hans-Adam II judicial protection in that regard, did not breach its obligations under the European Convention on Human Rights[18]. But we would all love to learn from the Respondent how this case might possibly have affected the real estate and other assets of which Liechtenstein and/or its nationals were deprived by the Czechoslovak Republic and which form the subject-matter of the present case. Germany has to repeat, almost *ad nauseam*, that even the combined intellectual powers of the leading international lawyers present today on behalf of Liechtenstein to listen to Germany's arguments have not managed to identify the allegedly evil act for which, as an infringement of Liechtenstein's rights under international law, Germany might be responsible. This is not just a matter of the ill-foundedness of the merits of the Application. A failure to present intelligible submissions that, if found to be proven, would ensure the success of the Application cannot and should not be

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[18] POG, Vol. II, Ann. 1, p. 1.

confused by the Court with a claim that deserves to be examined as to its merits. In fact, Liechtenstein had sufficient time to correct this failure. The Application was filed on 30 May 2001. Even then it should have occurred to the Applicant that its claims rested on flimsy foundations. The need to provide relevant detailed information became even more urgent after Germany filed its Preliminary Objections on 27 June 2002, in which it explicitly took issue with the lack of substantiation. However, in Liechtenstein's Observations, which were submitted almost five months later, on 15 November 2002, the reader again finds nothing but blanket assertions. No effort has been made by Liechtenstein to enlighten the Respondent and the Court as to the facts and arguments it wishes to resort to in order to demonstrate Germany's responsibility.

The requirements of legitimate diplomatic protection are not met

110. Additionally, Germany submitted in its Preliminary Objections that, inasmuch as the case falls within the class of diplomatic protection, the obligation was incumbent upon Liechtenstein to show, first, who the victims were, second, that the victims were of Liechtenstein nationality, and, third, which assets were allegedly affected. Of course, Germany acknowledges that details would have to be discussed at the merits stage. But the list contained in Annex 8 to Liechtenstein's Memorial was compiled in an almost cavalier fashion. It was not clear at all from that list that the victims of the Czechoslovak measures, or their heirs, were indeed Liechtenstein nationals. Now, for the first time, Liechtenstein has given some first rough indications, and these are indeed extremely revealing. In some cases, Liechtenstein now admits that the persons, which it claims are actually affected, do not possess Liechtenstein nationality: Nos. 7, 25 and 34. In other instances, the nationality issue is still under investigation: Nos. 2, 3, 4, 5, 9, 10, 31, 33. In a last group of cases, the alleged title holders cannot be traced: Nos. 29, 30, 35, 36. Thus, the claims relating to 15 persons out of 38 must be dismissed from the very outset. Germany now explicitly raises the objection which it could not raise beforehand, given the vagueness of Liechtenstein's submissions, namely that Liechtenstein is not entitled to assert a right of diplomatic protection in favour of those persons who are not its nationals.

111. Germany would like to add that the character of the list again makes clear that the true subject-matter of the case is the confiscatory measures taken by the Czechoslovak authorities

in 1945. The original list (Annex 8 of Liechtenstein's Memorial) comprises just the names of all those who in 1945 possessed assets located in Czechoslovakia and who were deprived of those assets at the hands of the Czechoslovak authorities. Apparently, nobody in Liechtenstein's judicial team thought of adapting that list to the strange logic underlying the Application, namely that Germany's judicial authorities interfered in the matter some time in the 1990s. And, indeed, it is a plain and incontrovertible fact that all of the 38 persons listed by the Applicant lacked their former property since 1945 and that since that time no additional deterioration of their legal position has occurred. What did happen in the intervening years were the unsuccessful attempts made by the Liechtenstein Government to obtain some amount of compensation from Czechoslovakia. It appears that all of these attempts have remained fruitless to this very day, Czechoslovakia denying Liechtenstein what it granted to Switzerland, whose nationals were also victims of the Czechoslovak campaign of confiscations.

The lack of substantiation cannot be remedied

112. It is in vain that Liechtenstein draws attention to the undeniable fact that proceedings may well be conducted in two stages, the first stage being devoted to clarifying the question as to whether the Respondent has incurred responsibility, the second stage then focusing on the amount of compensation owed as reparation for the damage caused by the relevant internationally wrongful act. All of the cases referred to by Liechtenstein[19] have a totally different background.

113. In the case of *Military and Paramilitary Activities in and against Nicaragua*[20], it was abundantly clear from the very outset what activities the United States had engaged in. Nicaragua could refer to a number of public documents that openly mentioned that the United States provided assistance to the *contras*, and it claimed furthermore that "certain military or paramilitary operations were carried out, not by the *contras*, . . . but by persons in the pay of the United States Government, and under the direct command of United States personnel, who also participated to some extent in the operations"[21]. Thus, there existed no mystery as to the submissions alleging unlawful conduct on the part of the United States.

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[19] OL, para. 4.26.

[20] Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14.

[21] *Ibid.*, pp. 21-22, paras. 20, 21.

114. The same is true of the *Oil Platforms* case[22]. The facts of that case were simple and straightforward. In paragraph 12 of the first Judgment, the Iranian submissions are set out in plain language. Iran stated that "on 19 October 1987 and 18 April 1988, certain oil platforms located on the Iranian continental shelf and belonging to the National Iranian Oil Company were attacked and destroyed by naval forces of the United States"[23].

Again, in this case the facts and arguments of the Applicant permitted of no doubt. Iran was of the view that the United States had acted unlawfully by attacking and destroying the oil platforms concerned and that, by so doing, it had incurred international responsibility. Well, a military [illegible] indeed constitutes an "act" in the sense contemplated by the ILC Articles on Responsibility of States. Consequently, both sides as well as the Court knew perfectly well what the subject-matter of the dispute was — which is not the case in the present controversy between Liechtenstein and Germany.

115. The other two cases mentioned by the Applicant follow the same pattern. In *Gabčíkovo-Nagymaros*[24] — and I hope I pronounce it correctly — Hungary charged the Czech and Slovak Federal Republic with "proceed[ing] to the 'provisional solution' (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course)"[25], while Slovakia submitted that "the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty attributes responsibility to the Republic of Hungary"[26].

Consequently, the subject-matter of the dispute between the two parties was well defined on both sides. Each contended that the other had violated specific international obligations by concrete acts which were plainly identified.

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[22] Judgment of 12 December 1996, *Preliminary Objection, I.C.J. Reports 1996*, p. 803.

[23] *Ibid.*, p. 808.

[24] Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 7.

[25] *Ibid.*, p. 15.

[26] *Ibid.*, p. 17.

116. No lengthy words need be lost either on the dispute concerning the *Land and Maritime Boundary between Cameroon and Nigeria*[27]. In that highly complex case, it would have been absolutely unreasonable to present submissions on the financial compensation owed to Cameroon, or even to Nigeria, before it had been clarified where the boundary between the two countries ran and who, consequently, had violated the territorial integrity of the other. Unlike Liechtenstein, however, the two parties had indicated in precise terms what had happened and what violations, according to their differing views, had taken place through specific actions. There was no lacuna in the submissions presented to the Court.

117. The two-stage arrangement of proceedings where reparation is sought for allegedly unlawful conduct on the part of the Respondent, which has become current practice before this Court, would be misconceived if used as a device to hide the true nature of the dispute before the proceedings pass on to the merits stage. The Applicant must put its cards on the table. It owes it to the Respondent — as well as to the Court — to state in unequivocal terms what the factual and legal premises of its claims are. The simple, though hollow formula, "inclusion of Liechtenstein's assets under the reparations scheme"[28], cannot serve as the foundation of a claim under international law. For many decades already Germany has owed no reparations to any State. Therefore, it remains a complete mystery what significance Liechtenstein attaches to these words.

118. Consequently, Liechtenstein is absolutely mistaken in contending that the Preliminary Objection raised by Germany can be dismissed by relying on the proposition that "lack of sufficient evidence is not a preliminary matter"[29]. Germany cannot but agree with the quotations taken from the learned treatises of D. W. Sandifer and J.-C. Witenberg. The preliminary stage is not the proper place for a discussion of evidentiary problems. However, Liechtenstein draws erroneous conclusions. It applies the relevant propositions to a factual configuration which would appear to differ from anything which to date has been observed in legal proceedings before international tribunals.

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[27] Judgment of 10 October 2002.

[28] OL, paras. 4.7, 4.23.

[29] OL, paras. 4.32-4.36.

119. Germany almost feels obliged to apologize for re-emphasizing a simple fact that it has highlighted several times already. It does not say that Liechtenstein has failed to prove its allegations. Germany is simply unable to detect in Liechtenstein's submissions any statement that could serve to support its claims. The contention that Germany has included former Liechtenstein assets in "the" reparations scheme cannot be proven, because nobody knows what this might possibly mean. This is a matter which does need to be dealt with at the preliminary stage of the present proceeding inasmuch as Germany's defence is seriously hampered by the complete lack of clarity of Liechtenstein's submissions.

No substantiation of alleged violation of Liechtenstein's sovereignty and neutrality

120. Germany notes, furthermore, that the Applicant has failed to respond to the argument raised in connection with the fourth Preliminary Objection that no trace of any interference with Liechtenstein's neutrality or sovereignty can be found in the Application or the Memorial. This failure has not been remedied in Liechtenstein's Observations. Hence, Germany must repeat what it just said about Liechtenstein's contention that the assets of its nationals were adversely affected by Germany's "change of position": no one who has read Liechtenstein's pleadings is any the wiser as to how, by which concrete, palpable measures, Germany could possibly have violated Liechtenstein's rights as a sovereign State which maintained its neutrality during the Second World War. Germany has always respected Liechtenstein, both during and after the Second World War.

Concluding observations

121. Germany recognizes that it may be difficult for Liechtenstein to accept that assets of its nationals confiscated by Czechoslovakia are treated as assets covered by Article 3, paragraph 3, of the Settlement Convention. However, the true meaning of that clause, which Germany had to accept in order to recover its sovereignty, is fairly modest. The clause does not imply that Germany assumed responsibility for the acts of the Czechoslovak Government to the detriment of a third, neutral State. The Allied Powers just wanted to prevent litigation on the complex issues of confiscation of private property for reparation purposes from being pursued before German courts. They felt that disputes over the lawfulness of taking such property should, if ever, be settled by negotiation between the parties concerned or possibly before the tribunals of other countries.

However, as regards the relevant Liechtenstein assets, Germany has never seen fit to take a stance on an issue which exclusively pertained to the bilateral relationship between Liechtenstein and Czechoslovakia and now forms part of the relationship between Liechtenstein and the Czech Republic.

122. Germany does not wish to deepen the issues just commented upon, not wanting to trespass on the merits of the case. It summarizes its pleadings concerning the fourth Preliminary Objection by stating that Liechtenstein has conspicuously failed to provide even a cursory reference to the facts and arguments that would be needed to support the contention that Germany has incurred international responsibility. No act has been identified which, if proven, could entail such responsibility.

Mr. President, I have come to the end of my pleading. May I suggest that you kindly give the floor to my colleague Pierre-Marie Dupuy. Thank you.

The PRESIDENT: Thank you, Professor Tomuschat. I now give the floor to Professor Dupuy.

M. DUPUY:

F. Cinquième exception préliminaire : les demandes du Liechtenstein obligeraient la Cour à statuer sur les droits et obligations de la République tchèque en son absence et sans son consentement

Monsieur le président, Madame et Messieurs les juges, c'est avec un plaisir toujours renouvelé que je m'exprime devant vous et je le ferai aujourd'hui pour l'Allemagne fédérale que je remercie d'avoir bien voulu pour la seconde fois m'honorer de sa confiance.

123. Il m'appartient aujourd'hui de vous présenter la cinquième exception préliminaire opposée par la République fédérale d'Allemagne à l'étrange requête que vous adresse la Principauté du Liechtenstein.

124. Cette exception, l'Allemagne ne la trouve pas dans des faits ou dans un comportement tangibles mais dans une absence; or, cette absence est déterminante, puisque c'est celle de la partie indispensable à la résolution d'un litige; un litige, qui, en réalité, oppose non pas le Liechtenstein à

l'Allemagne mais le Liechtenstein à la République tchèque, Etat successeur de l'ancienne Tchécoslovaquie.

125. Monsieur le président, Madame et Messieurs de la Cour, la lecture des écritures produites par la Principauté du Liechtenstein laisse, il faut bien l'avouer, une impression parfois un peu étrange. Il serait sans doute excessif de dire que son mémoire ou ses observations empruntent intégralement leur genre littéraire au fantastique.

Pourtant, sans s'apparenter directement aux contes jadis écrits par les frères Grimm, la thèse du Liechtenstein provoque à maintes reprises une insolite impression de décalage par rapport à la réalité. Cette sensation est entretenue par divers éléments; le demandeur y invoque, par exemple, la spoliation de biens dont la réalité et l'identité exacte, mis à part la peinture de Pieter van Laer, restent dans un clair-obscur que n'auraient pas désavoué les peintres baroques dont il faisait partie. Le mémoire laisse ainsi entrevoir des «châteaux» et de «vastes forêts» qui auraient fait l'objet de spoliations diverses. Mais il faut attendre son annexe 49, arrivant au stade des observations en réponse aux exceptions préliminaires soulevées par l'Allemagne, pour voir défiler la liste jusque-là inconnue de victimes et de biens dont l'énumération furtive n'apporte pas de substance à sa requête.

126. Mais, surtout, on constate d'emblée, dans les écritures de la Principauté, la présence, à la fois fantomatique et pourtant bien réelle, d'un Etat auquel il est fait non seulement allusion mais référence bien souvent répétée; un Etat, il est vrai, aujourd'hui disparu mais qui possède pourtant un successeur effectif. Cet Etat, c'est la Tchécoslovaquie; et son successeur, outre la République de Slovaquie, c'est la République tchèque.

Au demeurant, pour prendre conscience de cette présence, à la fois obsédante et pourtant occultée, d'un tiers à la présente instance, ouvrons plutôt le mémoire de la Principauté. Qu'y trouvons-nous ?

127. Dès sa seconde page (je me réfère ici à la pagination de la traduction officielle du mémoire du demandeur en français) au paragraphe 7 de l'introduction, apparaît la mention des fameux «décrets Beneš» pris par la Tchécoslovaquie au lendemain de la guerre. Le mémoire nous dit que la Tchécoslovaquie les a appliqués «non seulement aux ressortissants allemands, mais aussi à d'autres personnes qui auraient appartenu au «peuple allemand»». Application qui, au

demeurant, ne relève de rien ni de personne d'autre que de l'interprétation faite, de sa propre législation, par la Tchécoslovaquie elle-même au lendemain de la guerre.

Sans doute, nous répondra-t-on ! Mais, après tout, ne s'agit-il pas là de simples faits ? Des faits comme il en existe, par définition, à l'origine de toute affaire portée devant la Cour. Or, il n'en est rien.

Car, dès le début de son mémoire, le Liechtenstein est bien obligé de mettre en relation ces *faits* avec le ***droit***; d'emblée, c'est de la licéité des expropriations qu'il est ici question; et de leur licéité au seul regard du droit international public. Quelques lignes plus loin, en effet, au paragraphe 10, à la même page 2, le mémoire du Liechtenstein constate que la position de l'Allemagne est celle que les biens saisis en application de ces «décrets Beneš» l'ont été de façon *illégale*. On le voit, c'est de la légalité et des conséquences de ces décrets, pas d'autre chose dont il sera fondamentalement question tout au long de l'argumentation déployée par le Liechtenstein. La poursuite de la lecture du mémoire précité ne peut, du reste, que le confirmer.

128. Ainsi, au-delà de l'introduction, dans la première partie de ce mémoire, le Liechtenstein cite et décrit précisément le décret n° 12, daté du 21 juin 1945 et le décret n° 108, du 25 octobre 1945; le premier désigne à l'expropriation tous les biens agricoles de personnes réputées appartenir au «peuple allemand», et le second définit les biens confisqués par référence à leurs possesseurs, dont les «personnes physiques appartenant au peuple allemand … ne sont pas en mesure de fournir la preuve qu'elles sont demeurées fidèles à la République de Tchécoslovaquie»[30].

Décrivant ensuite la procédure judiciaire entreprise par le prince Hans-Adam II devant le Landgericht de Cologne, le mémoire cite le bureau des monuments historiques non de Bonn, de Munich ou de Berlin mais de ***Brno***, tel qu'agissant «en tant qu'organe de l'Etat de Tchécoslovaquie»; et, en effet, c'était bien la commission nationale de Brno, appliquant le décret n° 12 au prince Franz-Joseph de Liechtenstein en juillet 1945, qui l'avait spolié de ses biens.

129. Au chapitre suivant, le Liechtenstein constate, je le cite, que «l'Allemagne fut obligée d'accepter les mesures de réparation comme une donnée de fait»[31]. Il relève la déclaration

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[30] Voir, respectivement les paragraphes 1.13 et 1.16 du mémoire du Liechtenstein.

[31] Mémoire Liechtenstein, par. 3.7

allemande, datée de 1952 selon laquelle «le Gouvernement fédéral ne reconnaît pas la validité des expropriations»[32]. Il rencontre un peu plus loin le jugement de la cour d'appel de Cologne confirmant que la *qualification* des biens appartenant à des citoyens du Liechtenstein comme des biens allemands, telle qu'opérée par les autorités tchécoslovaques s'imposait aux juridictions allemandes. Partout, toujours, les décrets Beneš, leur interprétation, leur portée, leur légalité...

130. Voilà ce qui est au cœur du débat, Monsieur le président, Madame et Messieurs de la Cour, au fond de la requête articulée par la Principauté devant la Cour : la licéité ou l'illicéité des décrets Beneš; c'est-à-dire de décrets pris par un Etat dont je constate que son successeur n'est pas, aujourd'hui, présent à l'instance; ceci, non parce qu'il ne le pouvait pas mais parce qu'il ne le *voulait* pas. La République tchèque n'a pas voulu reconnaître votre compétence pour juger de la légalité internationale de sa législation interne. Vous ne pouvez pas passer outre à cette absence de consentement.

Alors, comme pour masquer cette réalité, le Liechtenstein entretient devant vous deux illusions : d'une part, qu'est établi entre lui et l'Allemagne un différend; alors que, s'il en existe un, il ne peut éventuellement que l'opposer à la République tchèque à propos de l'illégalité des expropriations affectant les biens de ses ressortissants; ensuite, seconde illusion, le Liechtenstein veut croire que la présence de l'Etat successeur de celui dont la légalité des actes juridiques est en cause n'est pas nécessaire à la recevabilité de sa requête.

131. Pour entretenir de telles illusions, on l'a vu, le Liechtenstein tente d'accréditer l'idée selon laquelle l'Allemagne aurait changé d'attitude à l'égard de la légalité de ces décrets.

Il se trouve que c'est faux. L'Allemagne n'a pas changé de position; et elle n'a pas davantage que par le passé la maîtrise de la qualification des biens rentrant dans le champ d'application des décrets Beneš; et ses tribunaux n'ont pas davantage que par le passé acquis compétence pour se prononcer sur la légalité des expropriations exécutées en application desdits décrets.

Mais, pour les besoins de la cause, supposons même que cela soit vrai; que l'Allemagne ait effectivement changé de position ! Il s'agirait de toute façon, encore et toujours, de juger de son attitude par rapport à la légalité des décrets Beneš. Or, ces décrets ne sont pas allemands; ils sont tchèques. Et la présence de la République tchèque est indispensable à l'examen de cette appréciation, puisque c'est *sa* responsabilité internationale qui est en cause en tant qu'Etat successeur de la Tchécoslovaquie.

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[32] *Ibid.*, par. 3.9.

Ceci, ce n'est pas moi qui le dis, c'est *vous* ! C'est la Cour, par la voie de sa jurisprudence.

Je vais donc brièvement en premier lieu rappeler le critère énoncé par cette jurisprudence (I); puis en second lieu l'interprétation que la Cour a faite de ce critère à l'occasion des affaires successives où la question dite de la «partie indispensable» a été par elle examinée (II). J'en tirerai en troisième et dernier lieu les conclusions pour l'application de cette jurisprudence à la présente affaire (III).

Le critère jurisprudentiel dit de la «partie indispensable» comme condition mise à la compétence contentieuse de la Cour

132. En 1954, la Cour examina il faut le dire une étonnante affaire, passablement complexe puisqu'elle mettait en cause plusieurs Etats à la fois[33]. L'Italie la priait de trancher certaines questions juridiques concernant une certaine quantité d'or monétaire appartenant à l'Albanie mais pris à Rome, par le III^{e} Reich allemand. Dans cette affaire, l'Italie revendiquait, concurremment à la Grande-Bretagne, un droit à faire valoir sur l'or monétaire appartenant à l'Albanie. L'or était bien albanais, en effet, et nul ne le niait. Mais voilà ! L'Albanie n'avait pas consenti à la compétence de la Cour pour examiner l'exception préalable soulevée par l'Italie. Pourtant, pour déterminer quel Etat pouvait revendiquer cet or monétaire, la Cour devait *d'abord* déterminer si l'Italie était fondée à demander réparation à l'Albanie. Dès lors, en l'absence du consentement de ce pays, la Cour a constaté dans les termes suivants qu'elle n'était pas compétente :

> «pour déterminer si l'Italie a titre à recevoir l'or, il est nécessaire de déterminer si l'Albanie a commis un délit international contre l'Italie et si elle est tenue à réparation envers elle; puis, dans ce cas, de déterminer aussi le montant de l'indemnité. Pour trancher ces questions, il est nécessaire de déterminer si la loi albanaise du 13 janvier 1945 était contraire au droit international. A la solution de ces questions, lesquelles concernent le caractère licite ou illicite de certains actes de l'Albanie vis-à-vis de l'Italie, deux Etats seulement, l'Italie et l'Albanie sont directement

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[33] Affaire de l'*Or monétaire pris à Rome en 1943, arrêt, C.I.J. Recueil 1954*, p. 19.

> intéressés. Examiner au fond de telles questions serait trancher un différend entre l'Italie et l'Albanie.»[34]

La Cour ne peut trancher ce différend sans le consentement de l'Albanie.

133. C'est à la lecture de ce passage de l'arrêt de 1954 que l'on constate à la fois l'originalité de la situation que la Cour décrivait et sa très grande similitude avec celle que nous rencontrons dans la présente affaire. On serait tenté de remplacer, dans le passage qui précède, les noms d'«Italie» par «Liechtenstein» et d'«Albanie» par «Tchécoslovaquie» pour avoir une analyse exacte des rapports de droit existant entre Vadus et Prague.

Afin de savoir si le Liechtenstein a droit à recevoir réparation pour le préjudice qu'il a subi, il faut d'abord savoir si la Tchécoslovaquie a commis un fait illicite à son égard. Pour cela, il faudrait décider si les décrets Beneš étaient contraires au droit international. Seuls, le Liechtenstein et, aujourd'hui, la République tchèque voire la République slovaque sont intéressés à une telle question. La position fondamentale de l'Allemagne est, quant à elle, bien connue. On perçoit ainsi le parallélisme des situations prévalant dans l'affaire de l'*Or monétaire* et dans celle relative à *Certains biens*.

- — Dans les deux cas, un Etat est demandeur dans une instance judiciaire[35] mais le succès de sa requête dépend de l'examen de la légalité des actes d'un Etat tiers à l'instance.
- — Dans les deux cas, le comportement dont dépend la réalité du droit à indemnisation de l'Etat requérant est un acte juridique interne dont la légalité internationale est en cause.
- — Dans les deux cas aussi, s'agissant en définitive de soulever la responsabilité internationale d'un Etat tiers, ses intérêts juridiques, et je cite ici la Cour dans l'arrêt de 1954, «seraient non seulement touchés par une décision, mais constitueraient l'objet même de la décision».
- — Dans les deux cas, enfin, la Cour ne peut se déclarer compétente, parce que lui fait défaut le consentement de l'Etat dont la légalité du comportement constitue un préalable à l'examen de la requête introduite devant la Cour.

Or, s'il est un principe fondamental pour établir la compétence contentieuse de la Cour, c'est bien celui du consentement préalable à cette compétence. Il me paraît inutile de m'étendre sur la positivité d'un tel principe.

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[34] *Ibid.*, p. 32.

[35] Car tel était bien le cas de l'Italie bien qu'elle ait elle-même soulevé cette exception d'incompétence.

Le développement de la jurisprudence de la Cour consécutif à l'affaire de l'*Or monétaire*

134. Après l'affaire de l'*Or monétaire*, la Cour a eu l'occasion de préciser encore le champ d'application de la règle dite de la «partie indispensable». Elle l'a fait en particulier dans deux affaires, rapprochées dans le temps sinon dans la substance, deux affaires dont on aurait pu penser — j'étais alors de ceux-là, en qualité de conseil de la République du Portugal — qu'elles devraient aboutir à la même conclusion pratique s'agissant de sa compétence. Or, il n'en fut rien; mais il devait résulter de ces conclusions divergentes une précision accrue de la façon dont la Cour interprète la règle dite de la «partie indispensable».

La première de ces deux affaires, jugée en 1992, concernait *Certaines terres à phosphate à Nauru*[36]. L'Australie, défendeur, y soutenait que le Royaume-Uni et la Nouvelle-Zélande étaient, l'une et l'autre, deux parties tierces au différend mais pourtant indispensables à sa solution. Aux termes du même instrument juridique, en effet, constitué par un accord de tutelle, la Nouvelle-Zélande et le Royaume-Uni partageaient avec l'Australie les fonctions d'autorités administrantes à l'égard du territoire de Nauru.

La Cour ne suivit pas le défendeur. En s'appuyant sur le précédent de l'*Or monétaire*, elle considéra que tant que les intérêts juridiques de l'Etat tiers ne constituent pas «l'objet même de la décision sollicitée», elle n'est pas empêchée de statuer sur la demande. Or, il lui paraissait possible d'examiner le comportement de l'Australie sans, du même coup, se prononcer également sur celui des deux autres Etats juridiquement (sinon pratiquement) chargés de la tutelle de Nauru. Elle semblait ainsi accréditer la thèse, par ailleurs très défendable sur la base des travaux de codification du droit de la responsabilité internationale, de l'individualisation de la responsabilité propre à chaque Etat, celle du défendeur à l'instance étant ainsi à distinguer de celle des tiers. Cependant, comme le rappellera par ailleurs la Cour, la responsabilité est une chose, la compétence pour l'apprécier en est une autre.

135. Aussi, peu de temps plus tard, dans l'affaire du *Timor oriental*[37], la Cour aboutit à une conclusion opposée à celle à laquelle elle avait été conduite dans l'affaire de *Certaines terres à phosphates à Nauru*. Dans l'affaire du *Timor oriental*, elle conclut qu'elle ne pouvait pas

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[36] *Certaines terres à phosphate à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt C.I.J. Recueil 1992*, p. 240.

[37] *Timor oriental (Portugal c. Australie), C.I.J. Recueil 1995*, p. 90.

poursuivre l'examen de la requête du demandeur, en l'occurrence, le Portugal à l'encontre de l'Australie, sans, du même coup, mettre en cause la licéité du comportement d'un Etat tiers à l'instance, à savoir l'Indonésie (dont on observera pourtant que les organes politiques des Nations Unies avaient réaffirmé à maintes reprises l'illicéité de l'occupation par la force du Timor oriental). Toujours est-il que la Cour déclara cette fois, qu'elle «ne saurait rendre une telle décision en l'absence du consentement de l'Indonésie».

136. Alors prenons un peu de recul, et comparons la jurisprudence *Nauru* et celle du *Timor oriental*. Cette comparaison permet aisément l'identification précise de la ligne poursuivie par la Cour d'une affaire à l'autre, sur laquelle elle s'est chaque fois très clairement expliquée. En l'affaire de *Certaines terres à phosphates à Nauru*, en effet, la Cour a considéré pouvoir poursuivre l'examen de la requête du demandeur pour la raison qu'elle expose dans les termes suivants :

> «dans l'affaire de l'*Or monétaire*... la détermination de la responsabilité de l'Albanie était une *condition préalable* pour qu'il puisse être statué sur les prétentions de l'Italie. Dans [l'affaire de *Nauru*], la détermination de la responsabilité de la Nouvelle-Zélande ou du Royaume-Uni n'est pas une condition préalable à la détermination de la responsabilité de l'Australie, seul objet de la demande de Nauru...»[38]

137. A l'inverse, il a paru à la Cour que la condition stricte exigée dans l'arrêt de principe de l'*Or monétaire* se retrouvait bien dans l'affaire du *Timor oriental*. Là, en effet, ce qu'on pourrait appeler *«le critère du préalable»* aboutissait à vérifier l'identité de la mise en cause des droits et obligations du tiers avec l'objet même du différend entre les Parties à l'instance; en d'autres termes, un préalable à l'examen de la requête du Portugal aurait été constitué par l'appréciation de la licéité du comportement de l'Indonésie à l'égard du Timor oriental.

La Cour a estimé qu'elle ne pouvait concevoir de porter un jugement sur le comportement de l'Australie, accusée par le demandeur d'avoir conclu un accord relatif à l'exploitation des ressources du plateau continental au large du Timor avec l'Indonésie, sans devoir, du même coup, se prononcer sur «les raisons pour lesquelles l'Indonésie n'aurait pu licitement conclure le traité de 1989 alors que le Portugal aurait pu le faire»[39].

C'est dans cette mesure, je cite toujours la Cour, que «les droits et obligations de l'Indonésie constitueraient dès lors l'objet même d'un tel arrêt, rendu en l'absence du consentement de cet

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[38] *Certaines terres à phosphates à Nauru, C.I.J. Recueil 1992.*, p. 261, par. 55; les italiques sont de nous.

[39] *Timor oriental (Portugal c. Australie), C.I.J. Recueil 1995.*, p. 101, par. 28.

Etat», ce qui irait directement à l'encontre du «principe de droit international bien établi», selon lequel «la Cour ne peut exercer sa juridiction à l'égard d'un Etat si ce n'est avec le consentement de ce dernier»[40].

138. **Indépendamment** de l'analyse qu'on peut faire des faits dans chacune des deux espèces, on ne peut en tout cas que constater la cohérence de la logique suivie par la Cour en 1954 lors de l'affaire de *Certaines terres à phosphates à Nauru* puis en 1995. Trois éléments convergent dans chacune des trois affaires, *Or monétaire*, *Certaines terres à phosphates à Nauru et Timor oriental*, pour dicter la solution à laquelle aboutit la Cour :

— d'une part, la vérification du caractère *préalable* ou non de l'appréciation de licéité du comportement du tiers pour les besoins de la réponse à la question posée par le demandeur;

— d'autre part, le constat de l'identité de cette appréciation de licéité avec l'objet même du différend entre les parties à l'instance;

— enfin, en tous les cas, le respect du fondement consensuel de la compétence contentieuse.

Les conclusions pratiques à tirer de la jurisprudence de la Cour dans la présente affaire

139. Dans notre affaire, si l'on applique le test des trois éléments que je viens d'énoncer, celui du caractère préalable, celui de l'identité entre l'appréciation de légalité des agissements du tiers et l'objet du différend, et celui du consentement à la juridiction, à quelle conclusion arrive-t-on ? Le constat ne me semble pas faire de doute :

— afin de pouvoir se prononcer, d'abord, sur l'illicéité de la prétendue reconnaissance par l'Allemagne des saisies tchécoslovaques; ensuite, sur l'existence éventuelle d'un enrichissement au bénéfice de l'Allemagne, la Cour devrait nécessairement *qualifier* en droit le comportement de la Tchécoslovaquie, dont le successeur est aujourd'hui la République tchèque. La détermination du caractère, licite ou illicite, des faits d'expropriation imputables à la Tchécoslovaquie est, en elle-même, un *préalable indispensable* à l'appréciation de la situation de l'Allemagne par rapport aux décrets Beneš;

— étant donné la liaison étroite du comportement allemand avec celui de la Tchécoslovaquie vis-à-vis des biens de ressortissants du Liechtenstein expropriés, le jugement porté sur la légalité des expropriations tchèques se confond bien avec «l'objet même» du différend que le demandeur a porté devant la Cour;

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[40] *Ibid.*

— or, il est patent que la République tchèque n'a pas reconnu la compétence de la Cour pour se prononcer sur la légalité internationale des décrets Beneš. Il en résulte immanquablement que la Cour ne peut déclarer recevable la requête du Liechtenstein, faute de pouvoir se prononcer sur des faits qu'elle n'a pas compétence à connaître.

140. Revenons brièvement, d'une part, sur la liaison substantielle évidente existant entre les griefs adressés par le Liechtenstein à l'Allemagne et la légalité des actes imputables à la Tchécoslovaquie; et d'autre part, sur le caractère authentiquement préalable de la question relative à la partie indispensable dans la présente affaire.

141. L'Allemagne est accusée par le Liechtenstein d'avoir reconnu illicitement des confiscations étrangères, ce qui, on l'a déjà dit, ne correspond pas à la réalité puisqu'elle a toujours souligné au contraire qu'elle ne la reconnaissait pas. Mais, en restant dans la logique même de la requête du demandeur, l'illicéité éventuelle d'une telle reconnaissace ne peut que se concevoir que dans la mesure où ces confiscations seraient elles-mêmes contraires au droit.

142. L'Allemagne est ensuite accusée d'enrichissement sans cause au motif qu'elle inclurait désormais les avoirs confisqués dans le montant global dû par elle à la Tchécoslovaquie et que ces avoirs viendraient en déduction de sa dette[41]. Mais, en tout état de cause, l'Allemagne ne pourrait s'être enrichie que si elle se trouvait elle-même dans l'obligation de verser des réparations à la République tchèque en tant qu'Etat successeur de la Tchécoslovaquie. Là encore, on retrouve alors la question préalable de la licéité des mesures d'expropriations tchèques. Le Liechtenstein en fait, du reste, l'aveu lui-même, dans son propre mémoire que je cite à nouveau :

> «L'Allemagne a jusqu'au milieu des années quatre-vingt-dix toujours considéré les décrets Beneš comme contraires au droit international. Dans ces circonstances, il n'était pas question d'enrichissement de la part de l'Allemagne : l'Etat défendeur considérait avec raison que les avoirs des ressortissants du Liechtenstein ne faisaient pas partie du régime des réparations et ne pouvaient, par conséquent, être déduits du montant dont elle était à ce titre redevable à la Tchécoslovaquie.»[42]

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[41] Mémoire du Liechtenstein, par. 6.43.

[42] Mémoire du Liechtenstein, par. 6.41.

On ne peut mieux souligner le lien entre appréciation de la validité des saisies et constitution éventuelle de l'enrichissement.

143. Lorsque, enfin, le Liechtenstein prétend que l'Allemagne a changé d'avis, s'agissant de la légalité des confiscations tchèques de biens appartenant à ses ressortissants, il confond, certes, avec une constance coupable, la question procédurale de la compétence des tribunaux allemands avec le procès substantiel de la licéité des saisies de biens. Il demeure, quoi qu'il en soit, que pour décider si le prétendu changement de comportement de l'Allemagne est illicite, il faut *d'abord* que la Cour se soit prononcée sur la légalité des mesures d'expropriation en tant que telles.

Au demeurant, les autres griefs adressés par le demandeur à la République fédérale découlent tout autant de l'appréciation préalable de la conformité des saisies tchèques au droit international.

Qu'il s'agisse, en effet, de la prétendue violation de la souveraineté du Liechtenstein ou de la méconnaissance de son statut de neutralité, elles sont, les unes et les autres, liées à la méconnaissance alléguée des droits des ressortissants du Liechtenstein, comme si c'était l'Allemagne, et non la Tchécoslovaquie qui les avait assimilés à des ressortissants du «peuple allemand».

On le voit, on se retrouve bel et bien ici dans l'hypothèse où l'appréciation du comportement d'un tiers à l'instance constitue «l'objet même» du différend porté devant la Cour par le demandeur.

144. Il résulte suffisamment de tout ce qui précède que l'examen de la licéité des saisies opérées par la Tchécoslovaquie constitue un préalable indispensable à celui des faits illicites imputés par le Liechtenstein à l'Allemagne. Il en découle que la Cour doit trancher *avant toute chose* la question de son aptitude à connaître d'un différend mettant directement en cause un Etat n'ayant pas voulu reconnaître sa compétence pour en connaître.

La Cour ne peut, en d'autres termes, contrairement à ce qu'elle a fait dans une affaire récente[43], attendre l'examen des questions de fond pour statuer sur sa compétence. Compte tenu du caractère authentiquement préalable de la question de la légalité des décrets Beneš et des mesures prises en leur application, *c'est dès la phase des exceptions préliminaires qu'elle doit se prononcer*, au risque, sinon, de s'engager dans l'examen de questions mettant directement en cause des droits et obligations d'un Etat qui n'a pas consenti à ce qu'elle ait compétence pour le faire.

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[43] Affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigeria (Cameroun c. Nigeria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 324, par. 116

145. C'est en vain, au demeurant, que, manifestement à court d'argument, le Liechtenstein croit pouvoir trouver un appui à ses thèses dans l'article 32, paragraphe 1, de la convention européenne pour le règlement pacifique des différends. Pour tenter de bâtir une argumentation, la Principauté convoque par la même occasion les travaux préparatoires de la dite convention et l'article 35 de l'Acte général d'arbitrage[44]. L'objet de cet amalgame désespéré est de convaincre la Cour que, puisque la convention européenne sur le règlement des différends reste applicable entre les parties même si un Etat tiers a un intérêt en cause, cela signifie que le Liechtenstein peut se plaindre de ce qu'il baptise un changement du comportement allemand à propos d'une expropriation d'avoirs du Liechtenstein dans l'ancienne Tchécoslovaquie. Il semble cependant, Monsieur le président, qu'il y ait des limites à ce qu'en droit allemand on appelle la *«Rechtsbeugung»*, c'est-à-dire la déformation du droit. L'article 32 de la convention européenne dit qu'une convention est applicable entre les parties; ceci, même si un Etat tiers est intéressé à leur différend. Cela pourrait tout au plus s'interpréter comme une reconnaissance du fait que ladite convention offre à l'Etat tiers éventuellement intéressé la possibilité d'intervention. Or, la République tchèque est un tiers à la convention de Strasbourg mais n'est pas intervenue.

On pourrait trouver bien des raisons à cela, dont une, évidente, est que la République tchèque ne saurait être intéressée à un différend fabriqué, de façon totalement artificielle, que le Liechtenstein aurait avec l'Allemagne, alors qu'elle sait, la République Tchèque, quant à elle pertinemment que le vrai litige, si l'on devait en trouver un, serait entre elle, la République tchèque, et la Principauté. Ainsi, l'absence d'intervention tchèque n'est pas le signe que la République tchèque n'ait pas d'intérêt en jeu avec le Liechtenstein, mais qu'elle veut surtout éviter que la Cour en débatte. Elle ne reconnaît pas la compétence de cette dernière pour en connaître. C'est tout.

146. Décidément, Monsieur le président, Madame et Messieurs de la Cour, il faut s'affranchir de l'atmosphère artificielle et parfois fantasmagorique engendrée par les thèses

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[44] Observations du Liechtenstein, par. 5.7 et suiv.

formulées par la Principauté : de quelque point de vue qu'on se place, la République tchèque, successeur de la Tchécoslovaquie n'est ni un mythe, ni un fantôme, ni un impalpable personnage de conte de fées venant hanter des châteaux improbables ou de «vastes forêts»; c'est, tout simplement un Etat tiers, mais ce tiers est vraiment indispensable. Et il est absent.

Sans lui, rien ne saurait être décidé.

Or, qu'on le veuille ou non, la Cour n'est pas l'enchanteur Merlin. Quelle que soit son autorité, elle n'a ni doigts de fée ni baguette magique : elle n'a pas le pouvoir de faire comparaître ce tiers devant elle. Il demeure et restera absent, autant qu'il est indispensable. Telle est la réalité, parce que c'est précisément cet Etat qui l'a voulu.

Or, la Cour a, certes, bien des pouvoirs; mais pas celui de se déclarer compétente alors qu'elle ne l'est pas. Le Statut de la Cour n'a vraiment aucun rapport avec les contes de Grimm ! Je vous remercie et je vous prie, Monsieur le président, de bien vouloir passer la parole au professeur Tomuschat.

The PRESIDENT: Thank you, Professor Dupuy. I now give the floor to Professor Tomuschat.

M. TOMUSCHAT :

G. Sixième exception préliminaire : les ressortissants du Liechtenstein concernés n'ont pas épuisé les voies de recours internes

Résumé de l'argumentation

147. Monsieur le président, Madame et Messieurs les juges, dans ses exceptions préliminaires, l'Allemagne a fait valoir que les ressortissants du Liechtenstein qui ont été victimes de mesures tchécoslovaques de confiscation n'ont pas épuisé toutes les voies de recours internes en vue de récupérer les biens dont ils ont été dépossédés ou de réclamer une compensation. Nonobstant la critique adressée par le demandeur à l'égard de ce raisonnement, l'Allemagne maintient sa position. Selon l'Allemagne, le demandeur n'est pas parvenu à démontrer que l'épuisement des voies de recours internes disponibles n'était pas une condition nécessaire pour les personnes touchées par la politique de confiscation suivie par le Gouvernement tchécoslovaque en 1945 et 1946 au détriment des citoyens du Liechtenstein, qui ont été classés à tort comme des

personnes appartenant au peuple allemand, indépendamment de leur nationalité (décret Beneš n° 12, 21 juin 1945).

Pas d'intervention des autorités allemandes sur les anciens avoirs du Liechtenstein en République tchèque

148. Les observations du Liechtenstein à cet égard débutent par une citation incomplète et trompeuse tirée des exceptions préliminaires et destinée à mettre en doute la logique de l'argumentation allemande[45]. L'Allemagne conclut en effet, au paragraphe 194 de son mémoire, qu'étant donné sa propre ligne de conduite, la condition d'épuisement des voies de recours internes manque de toute pertinence à son égard, car à l'exception du tableau de Pieter van Laer, il n'y a eu aucune intervention de la part des autorités allemandes sur les biens pour lesquels le demandeur revendique une compensation. Ces biens ont été confisqués par l'Etat tchécoslovaque. L'Allemagne n'y a jamais touché et ne savait même pas quelles étaient les pertes subies par les ressortissants du Liechtenstein concernés jusqu'à ce que le demandeur, dans ses observations du 15 novembre 2002 (annexe 49), fournisse une liste provisoire des éléments pertinents. Il n'est pas nécessaire de souligner l'insuffisance de cette liste, qui frappe le lecteur au premier coup d'œil.

149. Pour l'Allemagne, le contenu de cette liste est tout à fait nouveau. L'Allemagne n'a jamais pris aucune mesure affectant les avoirs qui y sont indiqués. C'est la raison pour laquelle il est impossible de déceler un lien factuel qui serait susceptible de servir de base suffisante pour l'exercice de la compétence des tribunaux allemands en la matière. Le système allemand de contrôle juridictionnel d'actes de puissance publique est probablement l'un des plus complets au monde. Même les actes législatifs parlementaires peuvent être contestés par un recours constitutionnel alléguant qu'un droit fondamental de l'individu a été enfreint. En ce qui concerne les décisions individuelles ou autres actes factuels des autorités administratives, la protection est encore plus exhaustive : quiconque est lésé dans ses droits par la puissance publique dispose d'un recours juridictionnel selon l'article 19, paragraphe 4, de La loi fondamentale.

150. Mais qu'aurait-on dû contester dans cette affaire ? Il n'existe rien, pas un seul acte du Gouvernement allemand qui aurait pu, de quelque manière que ce soit, affecter le statut des avoirs

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[45] Observations du Liechtenstein, par. 6.4.

dont les ressortissants du Liechtenstein ont été dépossédés en 1945-1946. Par conséquent, il leur était et leur reste impossible d'avoir recours au vaste éventail de moyens disponibles au sein du système juridique allemand, même si l'on fait abstraction de la convention sur le règlement de questions issues de la guerre et de l'occupation, afin de contester les pertes qui leur ont été infligées par les autorités tchécoslovaques. Personne ne pourrait présenter une demande plausible en faisant valoir que ses droits ont été touchés par une mesure prise par le pouvoir souverain allemand, mesures lui faisant grief. Ce que le demandeur a écrit à propos du «fait de soumettre au régime des réparations les biens du Liechtenstein»[46] est dénué de toute substance.

Conformément aux règles relatives à la protection diplomatique, il incombait aux victimes des mesures de confiscation d'épuiser les voies de recours internes dans l'ancienne Tchécoslovaquie en 1945-1946

151. L'Allemagne souligne cependant que les ressortissants du Liechtenstein concernés n'ont pas défendu leurs droits devant les tribunaux de la Tchécoslovaquie lorsque la stratégie de confiscation a été mise en œuvre. Cet argument peut-il être utilisé par l'Allemagne ? Le demandeur parle d'un «malentendu … quant au véritable motif de la présente action»[47]. L'Allemagne reconnaît ouvertement que son interprétation de la condition d'épuisement des voies de recours internes comporte des éléments évidents d'innovation juridique. Il est vrai, en effet, que cette condition sert normalement à fournir à l'Etat ayant commis un fait internationalement illicite l'occasion de corriger sa conduite délictueuse. Mais dans les circonstances de l'espèce, il va sans dire que l'on ne peut refuser à l'Allemagne le droit d'attirer l'attention sur la passivité qui a caractérisé la réaction des propriétaires du Liechtenstein face aux mesures tchécoslovaques de confiscation. Pour parler encore plus franchement : il n'y a eu aucune réaction active à toutes ces mesures.

Dans les circonstances de cette affaire, l'Allemagne est en droit d'invoquer le fait que les victimes n'ont pas épuisé les voies de recours internes

152. Pourquoi l'Allemagne est-elle en droit d'invoquer l'inaction des ressortissants du Liechtenstein concernés, le fait qu'ils n'aient pas mis en marche les recours aux recours

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[46] Observations du Liechtenstein, par. 6.22-6.23.

[47] Observations du Liechtenstein, par. 6.25.

disponibles, qu'ils ne se soient pas battus pour leurs possessions? Tout simplement parce que les mesures tchécoslovaques ont été les actes déterminants, privant les propriétaires de la jouissance de leurs biens. Par la suite, et jusqu'à l'époque actuelle, il ne s'est rien passé qui ait pu changer la position juridique. Lorsque les tribunaux allemands ont jugé, entre 1995 et 1998, l'affaire du *Tableau de Pieter van Laer*, le seul bien qui ait jamais été soumis à la juridiction allemande, la situation instaurée par le décret n° 12 du 21 juin 1945 existait depuis de longues décennies déjà. Lorsque l'action a été intentée devant le tribunal régional de Cologne, plus de quarante-cinq ans s'étaient écoulés, et lorsque la Cour constitutionnelle fédérale a rendu sa décision le 28 janvier 1998, les confiscations remontaient à pas moins de cinquante-deux ans. En ce qui concerne tous les autres biens, la situation générale n'a été ni modifiée ni confirmée par le résultat de la procédure dans l'affaire du *Tableau de Pieter van Laer*. L'Allemagne n'a pas été en mesure, dans les faits, d'exercer une quelconque influence sur ces biens, et n'en a pas eu non plus le droit selon les règles applicables dans le cadre de sa compétence internationale.

153. Dans une telle situation, alors que l'infraction alléguée n'est qu'un élément isolé dans une longue chaîne d'événements, débutant par un mépris ouvert des règles traditionnelles du droit des étrangers exigeant le respect pour la propriété des ressortissants d'un pays tiers, l'Etat prétendu coupable doit avoir le droit d'attirer l'attention sur le fait que sa contribution est non existante ou, tout au plus, marginale, et que les ressortissants du demandeur, qui a endossé leurs réclamations, auraient pu empêcher les préjudices qui leur ont été infligés en ayant recours aux moyens disponibles dans l'Etat qui a causé ces préjudices. L'Allemagne a reconnu, dans ses exceptions préliminaires, que les voies de recours qui existaient en Tchécoslovaquie en 1945 et 1946 ont été épuisées par le prince régnant, Franz Josef II[48]. Mais on ne trouve aucune trace, dans les conclusions du Liechtenstein, de quelque mesure similaire entreprise par l'une des autres victimes. Par conséquent, il est indéniable que les voies de recours internes n'ont pas été épuisées à l'époque où il aurait encore été possible de faire quelque chose afin d'éviter les pertes subies par les ressortissants du Liechtenstein concernés.

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[48] Exceptions préliminaires de l'Allemagne, par. 198.

154. La question de l'épuisement des voies de recours internes s'est posée en 1945 et n'a plus été soulevée avant les années 1990, alors que s'est produit le mystérieux «changement de position», comme l'a suggéré le demandeur. L'Allemagne a démontré qu'un tel «changement de position» n'a jamais eu lieu et qu'elle n'est de toute manière jamais intervenue sur les biens des ressortissants du Liechtenstein situés sur le territoire de l'ancienne République tchécoslovaque.

155. Etant donné que le différend constitue essentiellement un cas de protection diplomatique, dans le cadre duquel le Liechtenstein a pris fait et cause pour un nombre d'individus dont certains sont ses propres ressortissants, il va sans dire que ces personnes auraient dû revendiquer une protection juridictionnelle par voie de recours devant les tribunaux tchécoslovaques compétents au moment opportun, lorsque les confiscations ont eu lieu. Etant donné qu'aucune action de ce genre n'a été intentée par les victimes, la demande est irrecevable, et l'Allemagne invoque explicitement ce motif d'irrecevabilité, pour les raisons que nous venons d'expliquer et qui sont plus amplement détaillées dans les exceptions préliminaires[49].

Monsieur le président, nous sommes arrivés à la fin de notre plaidoirie.

The PRESIDENT: Thank you very much Professor Tomuschat. This brings to an end today's sitting. The Court will meet again on Wednesday 16 June at 10 a.m. to hear the first round of oral argument of Liechtenstein. Thank you.

The Court is adjourned.

The Court rose at 1 p.m.

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[49] Exceptions préliminaires de l'Allemagne, par. 195-208.

CR 2004/25

YEAR 2004

Public sitting

held on Wednesday 16 June 2004, at 10 a.m., at the Peace Palace,

President Shi presiding,

***in the case concerning* Certain Property (Liechtenstein *v.* Germany)**

ANNÉE 2004

Audience publique

tenue le mercredi 16 juin 2004, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***en l'affaire relative à* Certains biens (Liechtenstein c. Allemagne)**

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume Koroma Vereshchetin Higgins Parra-Aranguren Kooijmans Rezek Al-Khasawneh Buergenthal Elaraby Owada Tomka
	Judges *ad hoc*	Fleischhauer Sir Franklin Berman
	Registrar	Couvreur

The Government of the Federal Republic of Germany is represented by:

Mr. Thomas Läufer, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Edmund Duckwitz, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Jochen Frowein, Director emeritus of the Max-Planck-Institute for Comparative Public Law and International Law Heidelberg, Professor of Public International Law, University of Heidelberg,

Mr. Christian Tomuschat, Professor of Public International Law, Humboldt-University of Berlin,

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and the European University Institute of Florence,

as Counsel;

Mr. Daniel Erasmus Khan, Privatdozent, Visiting Professor at the University Bayreuth,

Mr. Andreas Paulus, University of Munich,

Ms Karin Oellers-Frahm, Max-Planck-Institute for Comparative Public Law and International Law Heidelberg,

Ms Susanne Wasum-Rainer, Head of the Public International Law Division, Federal Foreign Office,

Mr. Reinhard Hassenpflug, Federal Foreign Office,

Mr. Götz Reimann, Embassy of the Federal Republic of Germany,

as Advisers;

Ms Fiona Sneddon,

as Assistant.

The Government of the Principality of Liechtenstein is represented by:

H.E. Mr. Alexander Goepfert, Freshfields Bruckhaus Deringer, Düsseldorf, Special Commissioner of the Principality of Liechtenstein,

as Agent;

H.E. Mr. Roland Marxer, Ambassador, Director of the Office for Foreign Affairs of the Principality of Liechtenstein

as Advocate;

Mr. Dieter Blumenwitz, Professor of Public International Law, University of Würzburg and Munich,

Mr. Thomas Bruha, Professor of Public Law, University of Hamburg,

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Gerhard Hafner, Professor of Public International Law, University of Vienna, Associate Member of the Institute of International Law,

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, member and former Chairman of the International Law Commission,

as Counsel and Advocates;

Mr. Malcolm Forster, Professor of International Law, University College, London, Freshfields Bruckhaus Deringer, London,

Ms Juliane Hilf, member of the Chamber of Lawyers of Germany, Freshfields Bruckhaus Deringer, Cologne,

Ms Lucy Reed, member of the State Bar of New York, Freshfields Bruckhaus Deringer, New York,

as Advocates;

Mr. Daniel Müller, Temporary Lecturer and Research Assistant at the University of Paris X-Nanterre,

Mr. Stephan Wittich, Assistant Professor at the University of Vienna,

as Advisers;

Ms Nadine Heider, Freshfields Bruckhaus Deringer, Cologne,

Ms Gabriele Klein, Freshfields Bruckhaus Deringer, Düsseldorf,

as Assistants;

Mr. Thomas Dillmann, ECC Kohtes Klewes,

Mr. Thomas Pütz, ECC Kohtes Klewes,

as Information Officers.

The PRESIDENT: Please be seated. The sitting is now open. This morning the Court will hear the first round of oral argument of Liechtenstein. I give the floor first to Dr. Alexander Goepfert, Agent of Liechtenstein.

Mr. GOEPFERT:

1. INTRODUCTION TO THE TEAM

1. Mr. President, distinguished Members of the Court, it is a great honour for me to appear before you today as the Agent of the Principality of Liechtenstein. On behalf of Liechtenstein, may I express our appreciation to Professor Carl-August Fleischhauer and Sir Franklin Berman for their willingness to serve as judges *ad hoc*.

2. This is a case of paramount importance for Liechtenstein, because its sovereignty and neutrality are being denied by Germany under international law. Moreover, the international law issues at stake are such that the importance of the case extends far beyond Liechtenstein.

3. I am also honoured to introduce to you the persons representing Liechtenstein, who will submit to you our arguments supporting your jurisdiction over the Application filed on 30 May 2001, and the admissibility of that Application.

4. Ambassador Roland Marxer, Director of the Office for Foreign Affairs of the Principality of Liechtenstein will speak first. After I make a short further introductory statement concerning the true nature of this case, the five advocates who will follow — certain of them already well known to you — are Professor James Crawford, Professor Dieter Blumenwitz, Professor Thomas Bruha, Professor Gerhard Hafner, and Professor Alain Pellet.

5. In this matter I am further accompanied by counsel, including my law partners Professor Malcolm Forster, Dr. Juliane Hilf and Ms Lucy Reed, together with the advisers and assistants to the advocates and counsel.

6. To take care of administrative details, I note that we have provided a judges' folder containing copies of key materials referenced and that full citations to all references appear in the written version of our submissions.

7. It is my pleasure to introduce Ambassador Marxer. Mr. President, I would ask you to call upon Ambassador Marxer.

The PRESIDENT: Thank you, Dr. Goepfert. I now give the floor to Ambassador Marxer.

M. MARXER :

2. INTRODUCTION

Monsieur le président, Madame et Messieurs les juges,

1. C'est un grand honneur pour moi de me présenter aujourd'hui devant vous au nom de mon pays, la Principauté de Liechtenstein, dont je suis le directeur du ministère des affaires étrangères.

2. Avant toute chose, je tiens à renouveler les assurances de la grande estime de mon gouvernement pour la République fédérale d'Allemagne et à préciser que nous avons la ferme conviction que la solution que vous apporterez à la présente affaire renforcera la confiance entre les deux pays.

3. Monsieur le président, vous n'ignorez pas que ce n'est pas la première fois que le Liechtenstein saisit la Cour. Il reconnaît le rôle éminent qu'elle joue dans le règlement pacifique des différends entre Etats, tout spécialement en assurant une protection effective des petits Etats comme le Liechtenstein contre les actes illicites commis par des Etats plus grands.

4. Le Liechtenstein est une monarchie constitutionnelle, devenu un Etat indépendant il y a presque deux cents ans, en 1806, après l'effondrement du Saint-Empire romain germanique. D'une superficie de 160 kilomètres carrés, il compte environ trente-cinq mille habitants. Voisine de l'Autriche et de la Suisse, la Principauté est à quelques kilomètres seulement de la frontière allemande. En tant que membre du Conseil de l'Europe et de l'Espace économique européen, elle entretient des relations économiques et politiques étroites avec les autres Etats européens. En outre, Membre des Nations Unies, d'un certain nombre d'institutions spécialisées et de l'Organisation mondiale du commerce, elle participe activement aux relations internationales au plan mondial.

5. Le Liechtenstein a réussi à préserver sa neutralité durant les deux guerres mondiales. Cela n'a pas été chose aisée, surtout durant le second conflit mondial, face à la forte pression exercée par

le Reich allemand. La Principauté n'en a pas moins été le seul Etat européen qui n'a pas reconnu l'accord de Munich consacrant l'annexion illicite de la Tchécoslovaquie par l'Allemagne nazie.

6. Il va de soi que le Liechtenstein attachait une importance toute particulière au principe de neutralité. Mais la non-reconnaissance de l'accord de Munich a été également motivée par des considérations d'ordre historique et géographique. Un certain nombre de familles liechtensteinoises, au premier rang desquelles la famille princière, possédaient de vastes propriétés foncières et des biens importants en Tchécoslovaquie, notamment en Moravie et en Bohème, qui font aujourd'hui partie de la République tchèque, un des deux Etats successeurs de l'ancienne Tchécoslovaquie.

7. Lundi dernier, l'Allemagne a cru bon de comparer la prétendue inaction du Liechtenstein à la suite des confiscations des biens de ses ressortissants par la Tchécoslovaquie aux négociations fructueuses qu'a menées la Suisse avec ce pays[1]. Cette comparaison n'a pas lieu d'être. En effet, le Liechtenstein est loin d'être resté inactif. Tout comme la Suisse, il a, au contraire, rapidement essayé de négocier avec la Tchécoslovaquie. Mais, contrairement à ce qui s'est produit pour la Confédération helvétique, le nouveau régime tchécoslovaque a rejeté la demande du Liechtenstein que, à la différence des gouvernements précédents, il refusa de reconnaître. Le Liechtenstein n'a pas même pas été admis à participer aux négociations auxquelles l'Allemagne a fait référence lundi dernier[2]. Depuis lors, et jusqu'à ce jour, le Liechtenstein a, sans succès, multiplié les tentatives afin de trouver une solution à son différend avec la Tchécoslovaquie et ses Etats successeurs. Comme vous le savez, le prince — qui possède la grande majorité des biens en question — a, avec persévérance mais sans aucun succès, tenté de faire valoir ses droits devant les tribunaux tchécoslovaques. J'ai le regret d'ajouter que, depuis 1998, les choses se sont encore compliquées du fait que la République tchèque s'est appuyée sur la décision de la Cour constitutionnelle allemande dans l'affaire du *Tableau de Pieter van Laer*[3].

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[1] CR 2004/24, p. 30, par. 82 (M. Frowein).

[2] *Ibid.*

[3] Déclaration écrite de la République tchèque du 26 mai 1999 concernant la déclaration de la Principauté du Liechtenstein du 25 mai 1999, mémoire du Liechtenstein, vol. III, annexe 44, p. A495 (traduction du Greffe), p. 36-37 du texte français.

8. Monsieur le président, je ne reviens sur ces faits historiques que parce que l'Allemagne a jugé utile de les évoquer lundi dernier. Je ne saurais cependant trop insister sur le fait que, malgré les allégations contraires et répétées de l'Allemagne, notre différend avec l'ancienne Tchécoslovaquie, et aujourd'hui avec ses Etats successeurs, *ne constitue pas* le litige que la Principauté a soumis à la Cour. Celui-ci concerne — et concerne seulement — l'application, faite récemment *par l'Allemagne*, du régime des réparations de guerre aux biens appartenant au Liechtenstein et à ses nationaux. Ces actes, *de l'Allemagne*, sont contraires aux principes fondamentaux du droit international, ce que l'Allemagne persiste à refuser de reconnaître et, encore moins, d'y remédier, malgré les occasions que le Liechtenstein s'est efforcé de ménager à cette fin, par exemple lors des deux *rounds* de consultations diplomatiques à ce sujet, dont le dernier a eu lieu en juin 1999.

9. Ces consultations n'ont abouti qu'à une déclaration commune reconnaissant l'existence d'un différend qui pourrait être soumis à la Cour[4]. Bien qu'il ne m'appartienne pas de discuter des questions juridiques qui vont vous être présentées par les avocats du Liechtenstein, je tiens à souligner que cette déclaration commune du Liechtenstein et de l'Allemagne, en elle-même, démontre que cette situation sérieuse constitue un différend entre les deux Etats — contrairement aux allégations faites par la Partie allemande dans ses exceptions préliminaires[5].

10. Permettez moi, Monsieur le président, de clore ma présentation en insistant sur le fait que le Liechtenstein ne peut considérer les actes de l'Allemagne que comme, à la fois, une grave mise en cause de sa souveraineté et des droits résultant de son statut de neutralité, et une atteinte à ses droits de propriété et à ceux de ses nationaux.

11. Madame et Messieurs les juges, je vous remercie de votre bienveillante attention et je vous prie, Monsieur le président, de bien vouloir donner à nouveau la parole à M. Alexander Goepfert, agent du Liechtenstein.

The PRESIDENT : Thank you, Ambassador Marxer. I now give the floor to Dr. Goepfert.

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[4] Observations écrites du Liechtenstein, annexe 48 (traduction du Greffe), p. 67 du texte français.

[5] CR 2004/24, p. 20-21, par. 39-44 (M. Läufer).

Mr. GOEPFERT:

3. Introduction — the true nature of the case

1. Mr. President, distinguished Members of the Court, as Ambassador Marxer has indicated, my purpose in returning to the podium is to refocus these proceedings on the true nature of the dispute between Liechtenstein and Germany. I must do this because, on Monday, Germany addressed a case that is not the case before you. If there is any "artificial construct" or "lack of clarity" or "l'atmosphère artificielle"[6], I regret to say it is on the part of Germany.

2. You heard the distinguished Agent and counsel for Germany state — again and again — that Liechtenstein has not identified the international legal basis on which Liechtenstein rests its claims[7]. Perhaps Germany thinks if it repeats this enough, it will become true. It is *not* true.

3. It is the heart of Liechtenstein's case that Germany bears international responsibility for infringing Liechtenstein's neutrality and sovereignty by allowing Liechtenstein assets to be treated, for the first time in 1995, as German external assets for purposes of the Settlement Convention. This is what this case is about.

4. Let me be equally clear as to what this case is *not* about. This case is *not* about the Beneš Decrees. This case is *not* about the legality of the Beneš Decrees. This case is *not* about Liechtenstein's dispute with Czechoslovakia — now the Czech Republic and the Slovak Republic — over property belonging to Liechtenstein and its nationals. This case is *not* about compensation for the Czechoslovak confiscations. This case is *not* about just one painting.

5. Yes, Liechtenstein does have disputes with the Czech and Slovak Republics, but those disputes are not before this Court. Yes, the Czechoslovak expropriations and the Beneš Decrees must be understood, but only as background. Germany pretends not to understand, but it is not complicated. With your leave, I will walk you through this again — but, I hope, without following Germany's example of venturing too far into the merits.

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[6] For example, CR 2004/24, p. 13, para. 11 (Mr. Läufer); p. 44, para. 119 (Professor Tomuschat); p. 56, para. 146, (Professor Dupuy).

[7] *Ibid.*, p. 12, para. 5 (Mr. Läufer).

6. Ambassador Marxer has mentioned the historic connections between Liechtenstein and Czechoslovakia. In 1945, in Beneš Decrees Nos. 12 and 108, the new Government of Czechoslovakia expropriated the property not just of German nationals but also of *Liechtenstein citizens* — calling it "property of persons belonging to the German people"[8]. According to these Decrees, the confiscation was not for reparations from Germany, but *explicitly* for internal political reasons related to social justice and land reform.

7. No State contemplated that Liechtenstein property could be equated with German property for purposes of the German reparations régime under the Settlement Convention.

8. This situation changed dramatically as of 1995. The German courts — and, as a consequence of those court decisions, the German Federal Government as well — for the first time treated the Liechtenstein property as German external assets, subject to the reparations scheme in the Settlement Convention.

9. Germany's stubborn refusal to acknowledge the nature of Liechtenstein's case is perhaps best illustrated by this statement of the Agent on Monday[9]: "Germany was however obliged, in order to regain a position as a sovereign State to promise in the Settlement Convention that it would not sit in judgment over past confiscations." This statement is only correct if it is limited to confiscations for the purpose of German war reparations. The German courts could only take refuge in Article 3 (3) of Chapter 6 of the Settlement Convention if they had already concluded that the property in question had indeed been taken not only as German property but as "German external assets" seized for the purpose of reparation[10]. As I have just explained, Beneš Decrees No. 12 and No. 108 expressly were *not* for the purpose of reparations.

10. Mr. President, honourable Members of this Court, it was only in 1995 that, for the first time, Germany — and not Czechoslovakia and not any other State in the world — treated the Czechoslovak measures against Liechtenstein property as *reparation* measures effected against German external assets. This is an assertion which not even Czechoslovakia or its successors has ever advanced. Furthermore, before the European Court of Human Rights, in a case between

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[8] Decree No. 12 of 21 June 1945 and Decree No. 108 of 25 October 1945 (Memorial of Liechtenstein (ML), Anns. 6 and 7).

[9] CR 2004/24, p. 15, para. 17 (Mr Läufer).

[10] Settlement Convention, Ch. 6, Art. 3 (1) and 3 (3).

different parties and involving different claims to those now before you, Germany has declared that these measures were defensible, and went even further to assert that Germany now considers Liechtenstein citizens to be "persons belonging to the German people" in the *ethnic meaning of the term*[11].

11. Czechoslovakia — now the Czech Republic and the Slovak Republic — had absolutely nothing to do with the treatment of Liechtenstein property as German war reparations. This was a *unilateral* action by Germany.

12. So, beginning in 1995, we have Germany treating Liechtenstein property as German external assets for the purposes of the Settlement Convention. This is what we mean by Germany "including" Liechtenstein in the reparations régime, the phrase Professor Tomuschat claimed, unconvincingly, not to understand on Monday[12]. We mean Germany's "application" of the Settlement Convention reparations régime to that property.

13. It is elemental in international law that one State may not use, or treat, the property of a neutral State as war reparations. Liechtenstein submits — and will prove, at the merits stage — that Germany is internationally responsible for bringing the property of Liechtenstein and its nationals under the Settlement Convention umbrella of German external assets seized for reparations purposes.

14. Whatever else it does, Germany's infringement of Liechtenstein's sovereignty and neutrality causes moral injury to Liechtenstein. Liechtenstein seeks a declaratory judgment to this effect.

15. Germany's evident disdain of Monday for the concept of economic damages was not warranted. By including Liechtenstein property within the German reparations régime, Germany has obtained a very considerable economic advantage vis-à-vis Liechtenstein. Contrary to what Professor Tomuschat stated on Monday[13], Germany still owes substantial sums to the Czech and Slovak Republics as war reparations, as it does to other Allied and associated Powers of the Second World War. If this issue were closed, there would have been no purpose for the 2000 Agreement

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[11] ML, Ann. 36 (judges' folder, tab 4).

[12] For example, CR 2004/24, p. 37, para. 105; p. 43, para. 117 (Professor Tomuschat).

[13] CR 2004/24, p. 43. para.117 (Professor Tomuschat).

between Germany and the United States concerning the Foundation, "Remembrance, Responsibility and the Future", which we have included in the judges' folder[14].

16. It is striking that Germany only adopted this peculiar new position concerning Liechtenstein *after* the revocation, in 1990, of Article 5 of Chapter 6 of the Settlement Convention, which imposed on Germany an international law duty to compensate the owners of German external assets for losses resulting from the use of such property for reparation purposes.

17. At the risk of venturing into issues of substance, I must emphasize that, if Germany's interpretation were correct that it can lawfully treat Liechtenstein property as German external assets settling German war reparation debts, this would mean that any State with reparation claims against Germany — and there are many — could regard itself as entitled to seize Liechtenstein property in their territory, and such property may be found in such States. Moreover, it cannot be the case that one State can settle unilaterally its accounts with another State with the assets of the citizens of a third State.

18. As a further result, Liechtenstein faces for the first time the alarming prospect that the holders of Liechtenstein property in former Czechoslovakia may now legitimately dispose of that property by channelling the disposal to Germany. Should they do so, the nationals of Liechtenstein would be debarred from successfully restraining that wrongful disposal in the German courts, and in any jurisdiction in which German judgments are recognized, and would be so debarred *entirely* by reason of the unjustifiable legal position taken by the courts and other public agencies of the Federal Republic of Germany in and after 1995.

19. This cannot be right in international law. Liechtenstein calls on this Court to say so, at the phase of the merits.

20. Mr. President, honourable Members of the Court, I thank you for your kind attention. I ask you please to call upon Professor Crawford to open the substantive pleadings on behalf of Liechtenstein.

The PRESIDENT: Thank you, Dr. Goepfert. I now give the floor to Professor Crawford.

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[14] Judges' folder, tab 8.

Mr. CRAWFORD:

4. The dispute before the Court and the Court's temporal jurisdiction over the dispute

1. Mr. President, Members of the Court, it is an honour to appear before you on behalf of the Principality of Liechtenstein.

2. My task is twofold. First I have to demonstrate that there is a legal dispute which has been brought to this Court by Liechtenstein, and here I respond to what was said by the learned Agent for Germany on Monday. Secondly, I will demonstrate that this legal dispute — *this* dispute — falls within your temporal jurisdiction under Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes. Here I will respond to what has been said by Professor Frowein. These two tasks are closely connected. As soon as one understands what this dispute is about, one sees immediately that Germany's objection based on lack of temporal jurisdiction must fail.

A. The dispute brought before the Court

Two preliminary points

3. I turn then to my first task, which is to analyse the dispute brought before the Court, and to show that it is a legal dispute. I need to make two preliminary points, both I am afraid rather elementary.

(1) It is for the Claimant to formulate the case; Germany ignores the case Liechtenstein has actually brought in favour of another

4. The first point is, quite simply, that it is for the Claimant to present its case, and for the Respondent to reply to that case. It is an error that advocates sometimes make, to imagine the case they would like to have been brought before the Court and eagerly to refute that case, showing all its weaknesses. But this is not advocacy, it is a form of public wish fulfilment. The real case stands, if only because it has never been addressed.

5. Germany's Preliminary Objections committed this error in a persistent and evident way[15]. They attacked the case Germany believes Liechtenstein should have brought, the case it wishes Liechtenstein had brought, a case developed by Germany with only an indirect and passing

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[15] See e.g., Preliminary Objections of Germany (POG), paras. 59-60.

resemblance to the actual case, a case Germany believes it can win. And it is striking that on Monday counsel for Germany barely let the word neutrality pass their lips or the concept of moral injury. All that was at stake, they said, was a "modest" interpretation of the Settlement Convention — the word was Professor Tomuschat's[16]. This "modest" interpretation turned Liechtensteiners into Germans for present purposes, and Liechtenstein assets into "German external assets". But apparently we are not supposed to mind.

6. Of course if this dispute brought to the Court was Liechtenstein's dispute with Czechoslovakia, Germany's task would be simple. Czechoslovakia has not been annexed by Germany, the Munich Agreement of 1938 was void, and anyway Czechoslovakia has ceased to exist, this time voluntarily. You cannot have an international legal dispute with a non-existent State.

7. Then if the dispute which has been brought to the Court was Liechtenstein's disputes with the Czech and Slovak Republics, well they exist, but Germany is not a party to them. It is the wrong Respondent. How silly Liechtenstein is to have brought a case against the wrong Respondent!

8. Similarly, on this hypothesis, temporal jurisdiction would be a problem; the dispute with Czechoslovakia arose in 1945 when the expropriations occurred, long before the European Convention of 1957. And so on and so on, right down to *Monetary Gold*.

9. But all such hypotheses are beside the point. It is for Liechtenstein to formulate its case, and it is a case against Germany. Liechtenstein as Applicant was entitled to bring this very specific case before the Court, based as it is on real facts and real actions of Germany occurring in the past decade. That case should be assessed in its own terms and in due order by the Court, if I may say so respectfully. If you, Mr. President, Members of the Court, will hear our case, we will be grateful, and will submit to your judgment; we will even put up with the concerted torrent of adjectives from counsel opposite, "strange" from Professor Frowein[17], "*étrange*" from

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[16] CR 2004/24, p. 44, para. 121 (Professor Tomuschat).

[17] *Ibid.*, p. 22, para. 46 (Professor Frowein); also CR 2004/24, p. 12, para. 8 (Mr. Läufer).

Professor Dupuy[18], and from Professor Tomuschat that annihilating adjective "modest"[19]. All Germany asks is its modest interpretation, to treat us as German — and then it cannot understand our case!

(2) Germany asks the Court to dismiss the case on the merits at the stage of Preliminary Objections, contrary to the Court's practice and Rules

10. This brings me to my second preliminary point, which concerns the proper relation between jurisdictional objections and the merits. For Germany's Preliminary Objections have a second persistent failing: they attempt to have the Court decide the merits of the case in Germany's favour at this preliminary stage — in other words, they attempt a premature rejection of the case. And we heard more of the same on Monday. Germany's Agent called for us to make out "the international legal basis on which Liechtenstein wishes to rest its claims" — that is to say, to make out its case on the merits[20]. In French he lamented "*l'absence d'une quelconque base juridique concevable*", and again he went on to speak at some length on the merits[21]. For their part Germany's counsel repeatedly made conclusory assertions relating to the merits of Germany's position and the demerits of Liechtenstein's, on which the Court is *now* supposed to act. For example — I paraphrase, the precise references are in the transcript: there has been no change of position[22]; Germany has always been consistent[23]; the Settlement Convention is clear[24]; what courts say in their decisions is irrelevant under international law[25]; for decades Germany has not owed any other State any war reparations[26]; Germany had "no information whatsoever" as to a Liechtenstein property[27]; there is no possible basis for the German national authorities including courts to concern themselves with title to expropriated property[28], and so on, and so on. Now no

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[18] CR 2004/24, p. 46, para. 125 (Professor Dupuy).

[19] *Ibid.*, p. 44, para. 121 (Professor Tomuschat).

[20] *Ibid.*, p. 12, para. 5 (Mr. Läufer).

[21] *Ibid.*, p. 19, para. 38 (Mr. Läufer).

[22] *Ibid.*, pp. 23-25, paras. 54-58, p. 26, para. 63 (Professor Frowein).

[23] *Ibid.*, pp. 12-13, para. 8 (Mr. Läufer).

[24] *Ibid.*, pp. 44-45, para. 121 (Professor Tomuschat).

[25] *Ibid.*, p. 33, para. 95, p. 31, para. 87 (Professor Frowein).

[26] *Ibid.*, p. 43, para. 117 (Professor Tomuschat).

[27] *Ibid.*, p. 25, para. 59, p. 27, para. 69 (Professor Frowein).

[28] *Ibid.*, pp. 25-26, para. 62, p. 33, paras. 94-95 (Professor Frowein).

doubt each of these assertions can be discussed; in fact, we dispute each of them. But the present point is that they are all assertions as to the merits.

11. Mr. President, Members of the Court, in taking this line Germany misunderstands the well-established procedure of this Court. When a preliminary objection is lodged, the case on the merits is automatically suspended: Article 79 (3) of the Rules. The Court thereafter *cannot* proceed to the merits, unless either it dismisses the preliminary objections entirely or, exceptionally, joins them to the merits under Article 79 (7).

12. At least three of Germany's Preliminary Objections are particularly evident examples of attempts to get the Court to pronounce on the merits. These are the first — that there is no dispute; the second — the plea of domestic jurisdiction, and the fourth — that the claim is not substantiated. I will leave to colleagues the task of dealing with the second and the fourth Objections, but I need to say something about the first.

The substance of the first Preliminary Objection

13. In doing so I wish to make three main points. The first is historical: this dispute arose in fact in the period after 1995. The second is diplomatic, but has clear legal consequences. In the discussions and correspondence that then took place, Germany accepted that there was a dispute. The third is straightforwardly legal: the disagreement which then arose qualifies as a dispute within the meaning of Article 38 (1) of the Statute of the Court. It is not a dispute about the content of German law. It is not an attempt to appeal from a decision or decisions of a German court, or for that matter from a decision of the European Court of Human Rights under a convention on which Liechtenstein does not and cannot rely here before this Court. Rather it is a disagreement arising from a conflict of positions between two States over the treatment by one of them of the status, rights and claims of the other.

(1) The dispute arose after 1995

14. First then, as a matter of history, the dispute arose after 1995. It arose following the discovery in Germany of a painting which had been lent to a German municipal gallery for the purpose of an exhibition — lent in 1991. The reigning Prince claimed the painting. The matter was taken to the German courts, which decided, eventually, that the painting could not be claimed.

In the course of the German court processes, Liechtenstein raised the issue, in a graduated way, at the inter-State level. In an aide-memoire of 4 October 1995, Liechtenstein expressed concern at the apparent position taken by the municipality of Cologne — a State entity — that Liechtenstein assets were to be considered as German assets, and it asked Germany to ensure that such a position was not supported or avowed by its agencies[29]. But in their decisions of 10 October 1995 and 9 July 1996 the German civil courts dismissed the claim on the basis of Article 3 (3) of Chapter 6 of the Settlement Convention, that is to say, on the express basis that the property in question constituted "German external assets" whose seizure was beyond examination in German courts. The details of those judgments are set out in the pleadings and I will not repeat them[30]. The internal processes within Germany culminated in a decision of the Federal Constitutional Court in January 1998, affirming those decisions based on the Settlement Convention[31]. After due consideration, Liechtenstein raised the issue formally at the inter-State level in an aide-memoire of 3 June 1998[32]. The decision of the Federal Constitutional Court, according to the aide-memoire,

> "constitutes a violation of the legal status guaranteed by virtue of international law both with respect to the Liechtenstein Head of State and the State of Liechtenstein itself... Regardless of the recognition of the independence of courts, [the Government of the Principality of Liechtenstein] cannot accept the legal injury caused thereby."

Liechtenstein accordingly sought talks at the diplomatic level as soon as possible, and two rounds of talks were held, on 10 July 1998 and 14 July 1999. The diplomatic correspondence is set out in the pleadings.

15. The record shows clearly, then, that this specific dispute arose between Liechtenstein and Germany in the 1990s. It concerned Germany's increasingly emphatic acceptance of the proposition that property of Liechtenstein citizens could rightfully be treated as "German external assets" for the purposes of the Settlement Convention, with adverse consequences both for the individuals concerned and for Liechtenstein itself as a neutral State. Moreover this German position, originally adopted in the course of litigation concerning a single painting, became a

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[29] ML, Anns. Vol. III, p. A413.

[30] See ML, paras. 3.17-3.25.

[31] ML, paras. 3.26-3.30 and Ann. 32.

[32] ML, Ann. 41, Vol. III, p. A481.

general position, applicable to Liechtenstein as such and to all the Liechtenstein property. It was maintained and adopted by German officials, who declared that they had no option but to remain loyal to the decisions of their own courts. There was no hypothesis here; there was no attempt to explain away the *van Laer* decision as based on its own special facts; there was no suggestion, as there seems to have been in the *Nottebohm* case, that the individual concerned had German affiliations, was an enemy alien in disguise. Unlike Nottebohm, the individuals had *never* been German nationals. What the German courts decided for the one case the German Government made its own position, categorically.

16. Before 1995 there is no trace in the historic record of a dispute between Liechtenstein and Germany on this issue. After 1995, and especially after 1998, the situation is entirely different. As a matter of simple history that is when the dispute arose.

(2) Germany acknowledged the existence of a dispute

17. I turn to my second main point: Germany acknowledged in the subsequent discussions that there was a dispute.

18. Thus during the consultations the head of the German delegation expressly recognized that:

> "contrary legal opinions have been created and this divergence of opinion would continue to exist . . . A solution could only be found at a higher level. There was a possibility of an exchange of aides memoires prior to a possible further round or otherwise a settlement by judicial decision without any further steps."[33]

Thus Germany acknowledged that there was a divergence of legal opinions on a concrete question and that it "would continue to exist". Moreover one solution was "a settlement by judicial decision without any further [diplomatic] steps". And now it is said there is no dispute.

19. One may compare the acknowledgment by the German Minister for Foreign Affairs in his letter to his Liechtenstein counterpart of 20 January 2000. The letter acknowledges as a fact that "the German Government does not share the legal opinion" of the Government of Liechtenstein[34]. The letter continues: "In the event that you feel additional talks are required to discuss these claims, I would suggest that this be done on the level of specialized senior officials in

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[33] Written Observations of Liechtenstein (WOL), Ann. 48.

[34] ML, Ann. 45, Vol. III, p. A503.

continuation of the consultations of 10 July 1998 and 14 June 1999." Thus the German Minister for Foreign Affairs, Mr. Fischer, acknowledged the existence of the Liechtenstein claims and of a divergence of legal opinion over those claims. In doing so, of course, Mr. Fischer was facing the facts. That makes it even stranger that Germany now alleges that no dispute exists between the two States.

(3) The record discloses the existence of a dispute between Liechtenstein and Germany

20. I turn to my third point which, in the light of what I have said, can be brief. The record discloses the existence of a legal dispute between the two States. In this context I need hardly remind the Court of its constant jurisprudence. Under Article 38 of the Statute, your "function is to decide in accordance with international law such disputes as are submitted" to you. And you have always defined a dispute broadly: it is "a disagreement on a point of law or fact, a conflict of legal views or interests between parties"[35]. Here there is a disagreement on a point of law. There is a conflict of legal views; indeed that is manifest. There is also a conflict of legal interests. It may be in Germany's interests to resolve its disputes with the Czech and Slovak Republics as to the post-war treatment of Germans expelled from Czechoslovakia. Although Germany denies that it has changed its position, it is common knowledge, it is a matter of current record, that these disputes have not been formally resolved, but that informal steps towards their resolution have been taken in the recent past. Well, that is a matter for Germany. But what is clear to Liechtenstein — and has been made clear in a series of diplomatic démarches including, for example, the Note Verbale of 10 June 1997[36] — is that any efforts by Germany in this direction cannot be at the expense of Liechtenstein and cannot treat the rights and interests of Liechtenstein and its nationals as if they were German rights and interests.

21. Nor is it the case that the conflict of legal views which is brought to this Court relates to a purely historical or abstract controversy. The present dispute is about subsisting rights and interests. Germany does not plead mootness (by analogy with the *Nuclear Tests* cases), nor (by analogy with *Northern Cameroons*) does it plead that the dispute has been definitively settled by a

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[35] See case concerning *East Timor, I.C.J. Reports 1995*, p. 99, para. 22, with references to earlier decisions.

[36] ML, Ann. 39, Vol. III, p. A477.

competent body. The dispute has not been settled so far as Liechtenstein is concerned. Liechtenstein is the bearer of its own rights and the custodian of its own interests, and it is entitled not to have them compromised by being treated as German through some strange perversion of the *Mavrommatis* principle. Similarly it is entitled not to have them "settled" by some strange perversion of the Settlement Convention. This, Liechtenstein says, Germany has done — and if Germany denies doing so, that only adds one more element of disagreement on a point of law or fact, of conflict of legal views and interests, to the array of disagreements disclosed by the diplomatic correspondence.

Conclusion

22. Mr. President, Members of the Court, to summarize, in the years after 1995 Germany took the position that it was entitled vis-à-vis Liechtenstein to treat the Liechtenstein property as "German external assets" covered by the Settlement Convention, while at the same time denying any obligation to compensate Liechtenstein in the event that it did so as it did. Liechtenstein denied this claim as soon as it was made, and has done so consistently since. It denied that the Settlement Convention could lawfully be applied to Liechtenstein. Any such application, irrespective of whether actual harm was caused to specific individuals, involved an injury to Liechtenstein as a sovereign and neutral State. But in addition, harm was threatened and caused to Liechtenstein nationals. Now that is a legal dispute, if ever there was one. Moreover it is a dispute between these two States. For these reasons Germany's first Preliminary Objection must be rejected.

B. Germany's argument of temporal jurisdiction: Article 27 *(a)* of the European Convention

23. Mr. President, Members of the Court, I turn now to the third Preliminary Objection, Germany's claim that the present dispute falls outside the Court's temporal jurisdiction. This Objection is based on Article 27 of the European Convention for the Peaceful Settlement of Disputes, which provides as follows: "The provisions of this Convention shall not apply to: *(a)* disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute; . . ." As between Germany and Liechtenstein the Convention came into force on 18 February 1980, which is thus the critical date for present purposes.

24. Now the Parties agree that on 18 February 1980 no actual dispute had yet arisen between them concerning the application of the Settlement Convention to the Liechtenstein property. That is true both as concerns the van Laer painting and the Liechtenstein property generally. The German courts had never been confronted with the issue, and the question how they would apply the Settlement Convention to the Liechtenstein property had never been resolved; indeed it had never been publicly raised. I put the matter neutrally. In fact Liechtenstein claims that there was an understanding between the two States that the Settlement Convention did not apply, or at any rate that this was a position which Liechtenstein was entitled to believe that Germany was taking. If the question had arisen — if Germany had ever applied the Settlement Convention to Liechtenstein property, in a particular case or in general — issues of compensation under the Convention would have arisen. But that did not happen for the good historical reason that the claim that Liechtenstein assets were "German external assets", though considered internally by German lawyers, was never raised by Germany in any public forum.

25. Now Germany does not disagree that, if a dispute arose, it did so in the 1990s. But it argues vehemently, through Professor Frowein, whose overdue accession to the Bar I welcome, that this is irrelevant[37]. The non-existent dispute may have arisen in 1995 but it concerned facts and situations dating from 1945. Evidently Liechtenstein has been asleep these 50 years, deeply, like Sleeping Beauty. We've had Grimm's stories, I think we'll introduce Sleeping Beauty. For 50 years Liechtenstein has been asleep, deeply comatose. Liechtenstein has failed to notice the fact or situation concerning Germany until, in a new variation on the fairy tale, it is the Prince who is brought back to life, not by a kiss but by a decision of the Civil Court of Cologne!

The Court's approach to temporal objections

26. Mr. President, Members of the Court, before I deal with the German arguments on this point I need to outline the applicable legal test for temporal jurisdiction. For you have a settled jurisprudence on temporal objections, and Professor Frowein did not dispute that this jurisprudence applies equally to Article 27 *(a)* of the Settlement Convention. Allow me to summarize the position briefly.

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[37] CR 2004/24, pp. 22-23, para. 48 (Professor Frowein).

27. The issue first arose before your predecessor, the Permanent Court, in *Phosphates in Morocco*[38]. The question was whether a dispute which arose from a Moroccan decree of 1920 and a decision of the Moroccan Mines Department in 1925 had arisen before the critical date of 1931. Professor Roberto Ago, as he then was, argued that the breach was only committed when local remedies were exhausted. The Permanent Court disagreed (as, I might say, the International Law Commission was later to disagree[39]). According to the Permanent Court:

> "If, by establishing the monopoly, Morocco and France violated the treaty régime of the General Act of Algeciras of . . . 1906, and of the Franco-German Convention of . . . 1911, that violation is the outcome of the dahirs of 1920. In those dahirs are to be sought the essential facts constituting the alleged monopolization and, consequently, the facts which really gave rise to the dispute regarding this monopolization."[40]

28. Italy argued that, irrespective of the legality of the decrees themselves, the decision of the Mines Department gave rise to a continuing wrongful act, and to a denial of justice which was committed after 1931. But again the Court disagreed:

> "In its Application the Italian Government has represented the decision of the Department of Mines as an unlawful international act . . . That being so, it is in this decision that we should look for the violation of international law — a definitive act which would, by itself, directly involve international responsibility . . . In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist."[41]

29. In other words, in a State responsibility case, limits on temporal jurisdiction are to be applied not by looking at the source of the obligation said to have been violated, nor by looking at the surrounding factual situation, but by asking what is the "fact with regard to which the dispute arose", the "definitive act which would, by itself, directly involve international responsibility", on the case presented in the Application. The authoritative French text of the Judgment is even clearer: it refers to the situations or facts *"qui doivent être considérés comme générateurs du*

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[38] *1938, P.C.I.J., Series A/B, No. 74*

[39] See ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to General Assembly resolution 56/83, 12 December 2001, Art. 44 *(b)*; cf. Draft Articles on State Responsibility as adopted on First Reading (1996), Art. 22.

[40] *Ibid.*, pp. 25-26.

[41] *Ibid.*, pp. 28-29 (emphasis added).

différend"[42]. If that definitive act, that *"fait générateur"*, to adopt the concept of Roberto Ago which was adopted by the Commission, occurs before the critical date then there is no jurisdiction; if subsequent to it, then there is. The point was likewise expressed by the Permanent Court in the *Electricity Company of Sofia and Bulgaria* case when it said: "The *only* situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction . . . are those which must be considered as being the source of the dispute"[43]. And the Court went on to distinguish between the source of the rights relied on by the Claimant and the source of the dispute; what matters is the point at which the rights are denied. And this must be so, otherwise the 1957 Convention and similar instruments, would produce the result that old rights, old treaties, would become enfeebled by lapse of time, even in relation to recent denials of those rights or to recent breaches.

30. The point is equally clear from this Court's jurisprudence, going back to the *Right of Passage* case. The rights in question there were certainly old rights. They went back to the Maratha period of India before colonization. India denied that the rights had *ever* existed; it also claimed that its denial of the rights in 1954, if they existed, was lawful. But the Court held that the whole dispute, including the dispute as to the very *existence* of rights going back to the eighteenth century, only concerned a situation which arose in 1954. You said:

> "It is clear from the material placed before the Court that before 1954, passage was effected in a way recognized as acceptable to both sides. Certain incidents occurred, but they did not lead the Parties to adopt *clearly-defined legal positions* as against each other . . ."[44]

So, although there may be some lack of agreement between the parties, and even "minor incidents", it is only when the parties "adopt clearly-defined legal positions" that the dispute arises, and it arises *in relation to* the triggering event, not the whole legal and factual matrix against the background of which the event is to be understood.

31. In best common lawyer's fashion, Professor Frowein sought to distinguish the *Right of Passage* case. He did so on the ground that there was a common position in 1954 as to the right of

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[42] *Ibid.*, p. 23.

[43] *1939, P.C.I.J., Series A/B, No. 77*, pp. 81-82 (emphasis added).

[44] *Ibid.*, pp. 34-35 (emphasis added).

passage which was only denied by India at that time[45]. But that is not true and it is not what you said. What you said was that, although there were earlier symptoms of disagreement, which occurred before the critical date, the situation had been managed up to that date. You said that the crucial fact or situation with respect to which the temporal objection or the temporal reservation operates, only arises when the dispute is triggered by a denial of the right, in this case the right of passage, leading the parties to "adopt clearly-defined legal positions as against each other". That was the focal point of the dispute, the *fait générateur*. It was with respect to that fact or situation that the dispute arose.

32. The point can be demonstrated equally from what you said in the provisional measures phase in the *NATO* cases. The situation there was like that in *Phosphates in Morocco* and quite unlike that in the present case. The Kosovo bombing campaign had started before the critical date and had already given rise to a dispute. By definition that dispute related to facts or situations prior to the critical date. You emphasized in your Provisional Measures Order that there were no "new disputes, distinct from the initial one" which related to facts or situations after the critical date[46]. But the relevant fact or situation there was the immediate crisis in Kosovo leading to the bombing campaign; it was not the Battle of Kosovo Polje in 1389!

The Court's test applied: Germany's legal arguments

33. Against this background I turn to the facts of the present case. The position is clear. This dispute was triggered — was triggered — by decisions of German courts, and subsequently by positions taken by the German Government, in the period after 1995. That was its focal point. It is true that the background situation and the legal rights and obligations of the Parties had an older source. But that is irrelevant, just as it was irrelevant in the *Right of Passage* case. As you said in *Right of Passage*, "[t]he facts or situations to which regard must be had in this connection are those with regard to which the dispute has arisen . . ."[47] This dispute arose in the 1990s with regard to the conduct of organs of the German State. It was only then that Germany actually decided to treat the Liechtenstein property as falling within the Settlement Convention, as "German external

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[45] CR 2004/24, p. 27, para. 68 (Professor Frowein).

[46] *I.C.J. Reports 2001*, pp. 134-135, para. 29.

[47] *I.C.J. Reports 1960*, p. 35.

assets", to quote the language of that Convention. In this respect I would draw your attention to the survey of German case law and doctrine which is Appendix 1 to Liechtenstein's Written Observations. This shows the fact quite clearly, and indeed Germany does not seem to dispute it. To borrow again your language, "[i]t was from all of this that the dispute referred to the Court arose; it is with regard to all of this that the dispute exists. This whole, *whatever may have been the earlier origin of one of its parts*, came into existence only after [the critical date]"[48].

34. Now Germany resists this conclusion with three arguments.

(1) The Court will have to examine transactions and events occurring before 1980

35. *First*, Germany claims that in order to resolve the present dispute the Court is going to have to investigate and analyse transactions and events occurring before 1980, and also to explore the meaning of treaties concluded before that date, especially, of course, the Settlement Convention. As Germany put it in its written pleadings: "[t]he case brought before the Court could not be decided without judging upon the reparations regime established in 1945 and thereafter"[49]. But the present dispute did not arise because of the reparations régime, any more than *Phosphates in Morocco* arose because of the Treaty of Algeciras. Or as Germany put it on Monday, this case could not, it said, be decided without adjudicating upon the Beneš Decrees[50]. But the present dispute did not arise because of the Beneš Decrees and, as Professor Pellet will shortly show, it does not require you to adjudicate upon them. It was the decision by Germany to apply the Settlement Convention to the Liechtenstein property which gave rise to the dispute, and that is the essential fact. Of course in dealing with the dispute the Court will have to inform itself as to the reparations régime. But in the *Right of Passage* case, the critical date for which was in the 1950s, the Court clearly dealt with the régime of passage between Goa and the Portuguese enclaves, and in doing so had regard to treaties and practice going back to the eighteenth century. Nonetheless it did so with respect to a dispute which it held only arose in 1954, when the legal positions of the parties crystallized following the outright denial by India of the right claimed by Portugal. As the

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[48] *Ibid*. (emphasis added).

[49] POG, para. 96.

[50] CR 2004/24, p. 48, para. 130 (Professor Dupuy).

Court noted, the dispute between India and Portugal did not arise because of the right of passage; it arose because the right had been denied. And that is the case here.

(2) The distinction between the source of the obligation and its breach is irrelevant and unworkable here

36. *Secondly*, Germany asserts that "[i]n the present case it is quite impossible to make a meaningful distinction between the source of the rights alleged by Liechtenstein and the source of the alleged dispute"[51]. But in the *Right of Passage* case, where again the source of the rights was not beyond doubt, the Court had no difficulty in drawing that distinction — and it did so even with respect to the aspect of the dispute that involved India's outright denial that there were any rights. Similarly, here there is a clear distinction in principle between the legal situation in which the Parties were placed, which arose partly before the critical date, and the event which caused the dispute, which was its actual source, which arose well after that date.

37. Professor Frowein complains vehemently that the effect of Liechtenstein's interpretation is to nullify the temporal objection entirely[52]. That is not so. The Court has given a reasonable interpretation to temporal limitations, neither delving too far back into the history of disputes, a history which — let us face it — underlies so many international conflicts in Europe and elsewhere, nor focusing on the other hand exclusively on the latest diplomatic manifestation of a well-established fact or situation which is at the heart of a dispute. It looks at the focus of the dispute as a whole, not its various ingredients considered in isolation. Far from nullifying the temporal exception this gives it due effect, which is the aim of all treaty interpretation.

(3) The change of position argument

38. *Thirdly*, Germany denies, vehemently, that there was any change in its position after 1980. It is said to follow from this that any dispute which arose after 1980 was only the manifestation of something which must have existed before. You will have noticed that this put Professor Frowein in a somewhat difficult position. He denied vehemently that there was a common position before 1980[53]. He said you could not exercise jurisdiction over this non-existent

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[51] POG, para. 77.

[52] CR 2004/24, p. 31, para. 86 (Professor Frowein).

[53] CR 2004/24, p. 26, para. 63 (Professor Frowein).

dispute because the non-existent common position must relate to facts or situations before 1980[54]. And then Germany accuses us of being hypothetical!

39. I should first of all observe that the change of position argument is part only of Liechtenstein's claim, and not its exclusive basis, as Professor Frowein apparently believes. Liechtenstein claims that for Germany to treat Liechtenstein assets as "German external assets" for the purposes of the Settlement Convention is a violation of international law in the specific situation which faces us here. We do not put forward encyclopaedic categories of claims relating generically to the treatment by national courts of stolen assets; we do not engage in general debate as to conflict of law theory, interesting though it is. We say that in this specific context in which these two States were placed after 1990, for Germany to do as it did is a violation of our rights. The debate about change of position is an aspect of that specific context, and it is of course a debate for the merits.

40. But let us consider three possibilities. Let us assume first of all that German and Liechtenstein had actually agreed in a treaty, before the critical date, that the Liechtenstein assets were not to be considered German external assets for the purposes of the Settlement Convention. Then in 1998, after the critical date, the Federal Constitutional Court refuses to give effect to that agreement. In such a case the temporal limitation would not apply. The source of Liechtenstein's rights would go back to the agreement, but the source of the dispute would be recent. And, as far as I can tell, Professor Frowein expressly accepts that[55].

41. Then let us take the opposite case. Let us assume that the matter was never considered before 1980, so there was no common position. That, Professor Frowein vehemently said, is the truth[56], although it is not a truth he wants you to take into account for the purposes of the third Preliminary Objection. On that basis, on the assumption that the matter had never been considered before the critical date, the source of Liechtenstein's rights will have to be found elsewhere, in

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[54] *Ibid.*, p. 26, para. 63 (Professor Frowein).

[55] *Ibid.*, p. 28, para. 74 (Professor Frowein).

[56] *Ibid.*, p. 26, para. 63, p. 29, para. 79 (Professor Frowein).

general international law. But *a fortiori* in this case the focus of the dispute will be the denial of those rights. Of course, at this stage they are claimed rights, whether they exist is clearly for the merits. And that denial occurred in the 1990s.

42. And now we have a third possibility, that there was no formal agreement as to the legal situation, but something like a common assumption that Liechtenstein assets are not "German external assets" for the purposes of the Settlement Convention. Such an assumption would no doubt have influenced the Parties in their behaviour until 1990. Then, in 1995, Germany contradicts the assumption. Is the position any different? Of course it is not. Still the focal point of the dispute, the situation or fact to which the dispute relates, *le fait générateur*, is not the underlying legal and factual grounds of the right that is claimed but the situation or fact in which the right has been denied. It is as simple as that.

Conclusion

43. Mr. President. Members of the Court, in the situation in which it was placed in 1980 or in 1990, it was not incumbent upon Liechtenstein to anticipate what German courts might do, or what attitude the German courts might adopt, in the event that a case involving the Liechtenstein property were to arise. The present dispute concerns the question whether Germany was entitled as a matter of international law to treat any item of Liechtenstein property as "German external assets" covered by the Settlement Convention. The German judicial and executive positions, taken in the 1990s, were the necessary and sufficient source or cause of the international dispute that then immediately arose — its *fait générateur*. For all these reasons, Liechtenstein submits that the Court has temporal jurisdiction to deal with the present case.

Mr. President, I would now ask you to call on Professor Blumenwitz who will deal with Germany's second Preliminary Objection, concerning domestic jurisdiction.

The PRESIDENT: Thank you, Professor Crawford. I now give the floor to Professor Blumenwitz.

Mr. BLUMENWITZ:

6. Germany's domestic jurisdiction argument

1. Mr. President, distinguished Members of the Court, it is a great honour for me to appear today for the first time before this Court. In my presentation I shall deal very briefly with the issue of domestic jurisdiction. For the convenience of the Court, I recall Article 27 *(b)* of the European Convention for the Peaceful Settlement of Disputes[57], according to which the provisions of this Convention shall not apply to "*(b)* disputes concerning questions which by international law are solely within the domestic jurisdiction".

2. As to Article 27 *(b)* itself, there is little to add to what my learned colleague Professor Frowein said on Monday[58]. Article 27 *(b)* refers to the concept of domestic jurisdiction under international law[59]; there is no question of any subjective assessment by the respondent State. It also requires — and this has not been addressed by Professor Frowein — that the dispute in question be one which, as a matter of international law, is *solely* within the domestic jurisdiction of the respondent State.

(a) Domestic jurisdiction in the case law of the Court

3. In applying Article 27 *(b)*, it is useful to refer to the case law of this Court. Both this Court and its predecessors have been consistent in their treatment of the domestic jurisdiction exception. You have refused to allow the plea of domestic jurisdiction to be used to convert issues of the merits into preliminary or jurisdictional issues. Domestic jurisdiction is a genuinely jurisdictional plea — it applies only, solely, to those cases where it is *exclusively* a matter for the respondent State to decide what is to be done in relation to the subject-matter of the dispute. Thus the Permanent Court in the case of the *Tunis and Morocco Nationality Decrees*[60] rejected the plea even in a case involving conferral of nationality — a matter prima facie within the reserved domain

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[57] United Nations, *Treaty Series*, Vol. 320, No. 4646, pp. 243 *et seq.*; judges' folder No. 1.

[58] CR 2004/24, p. 31, para. 87 (Professor Frowein); see also Observations, pp. 25-37, Ch. 2.

[59] See generally on this concept G. Guillaume, Art. 2, para. 7, in: J.-P. Cot/A. Pellet (ed.), La Charte des Nations Unies, 2nd ed. (1991), Paris: Economica.

[60] *1923, P.C.I.J., Series B, No. 4.*

of the State — on the basis that France's conferral of nationality was disputed on international law grounds. The Court said in a famous passage:

> "when once it appears that the legal grounds *(titres)* relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, . . . the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law"[61].

There is a nice contrast in this passage between the term "provisional" and the consequence: once the *provisional* conclusion is reached that the arguments are of juridical importance for the dispute, then the matter *definitively* ceases to be one of domestic jurisdiction.

4. Although *Tunis and Morocco Nationality Decrees* concerned the competence of the League Council under Article 15 (8) of the Covenant, the principle has been applied in the context of contentious cases by this Court, which has never upheld an objection based on the argument of domestic jurisdiction under international law[62].

5. For example, in the *Interhandel* case, the United States submitted that the seizure of shares of a Swiss company, which was allegedly controlled by a German company was, according to international law, a matter within the domestic jurisdiction of the United States. This Court confined itself to considering:

> "whether the grounds involved by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this case and, if so, whether questions relating to the validity and interpretation of those grounds are questions of international law"[63].

6. In the *Right of Passage* case, this Court stressed that the existence of a dispute "on the plane of international law" was in and of itself sufficient to preclude a matter falling within the domestic jurisdiction. In its Judgment on the merits, the Court held that the mere assertion by India that the rights claimed by Portugal did not exist was not a basis for invoking its domestic jurisdiction. The point was that the Court could only determine that the rights did not exist "after first establishing its competence to examine the validity of these (Portuguese) titles"[64].

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[61] *Ibid.*, p. 26.

[62] See also the Advisory Opinion "Interpretation of Peace Treaties with Bulgaria, Hungary and Romania", *I.C.J. Reports 1950*, pp. 65 *et seq.*, pp. 70-71, on Art. 2 (7) United Nations Charter, *I.C.J. Reports 1959*, pp. 6 *et seq.*, *I.C.J. Reports 1957*, pp. 125 *et seq.*

[63] *I.C.J. Reports 1959*, pp. 6 *et seq.*, p. 24.

[64] *I.C.J. Reports 1960*, pp. 6 *et seq.*, pp. 32-33.

***(b)* The Court's test applied to the facts of the case**

7. The question is therefore whether the arguments of Liechtenstein may provisionally be considered to be "of juridical importance for the dispute". If so, then the dispute is definitively not within Germany's domestic jurisdiction.

8. So, what is the dispute? Mr. President, distinguished Members of the Court, as you have heard, it is a dispute concerning Germany's treatment of certain property claimed by Liechtenstein under international law. Germany through its official organs refused to decide Liechtenstein's claims relying on another rule of international law, that is contained in the Settlement Convention[65]. Liechtenstein disputed the application of the Settlement Convention: in its view, Germany's interpretation of the Convention was wrong, and anyway Liechtenstein is not a party to the Convention and is not bound by it. Germany rejected Liechtenstein's protests and affirmed, in categorical terms, the decisions of the German courts. The arguments raised by Liechtenstein are all based on international law. In due course, it will be for you to decide on them. But it is undeniable that they are provisionally of juridical importance to the dispute presented before you. Germany purported to act on a certain basis under a treaty. On various grounds, Liechtenstein challenged its rights so to act. That is what the dispute is about. It is not about something intrinsically or inherently German.

9. On Monday, Professor Frowein explicitly acknowledged that international legal issues arise in this case[66], and he referred repeatedly to the Settlement Convention, an international treaty[67]. But at the same time he claimed that international law was silent as to the obligations of third States in relation to the confiscated property[68]. And he introduced the purely hypothetical argument that the outcome of the German court decisions in question might have been the same, if no international rule had been invoked[69]. Here, Mr. President, distinguished Members of the Court, I must stress that questions of the fate of the painting under the rules of private international law were not argued before the German courts, nor were they raised in the bilateral consultations.

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[65] Convention on the Settlement of Matters Arising out of the War and the Occupation of 26 May 1952 as amended on 23 October 1954, *Bundesgesetzblatt*, 1955, Part II, pp. 406-459, judges' folder tab 2.

[66] CR 2004/24, p. 32, para. 89 (Professor Frowein).

[67] *Ibid.*, p. 32, para. 91 (Professor Frowein).

[68] *Ibid.*, p. 33, para. 93 (Professor Frowein).

[69] *Ibid.*, p. 33, para. 94 (Professor Frowein).

They have no bearing whatsoever on the present dispute, which is based entirely on the principles of public international law.

10. Professor Frowein cited no authority for his proposition that international law is not concerned with the reasoning of municipal courts but only with the results of the decisions. And this is not surprising since there is no authority to that effect. Under international law any statement capable of being attributed to the State may have an international law impact. For example, unlawful discrimination may be revealed much more by what a court says than by the actual outcome of the case. And this is even more true if the offending statement is subsequently adopted by the Government at the international level — as happened in the present case.

11. On Monday, Professor Frowein argued that, because there is no rule of public international law applicable to the treatment of property in the domestic courts of any State, therefore the matter falls within Germany's domestic jurisdiction[70]. That argument is strongly reminiscent of India's fifth preliminary objection in the *Right of Passage* case that Portugal's asserted rights did not exist or were not reasonably arguable[71]. Such an assertion is clearly a matter for the merits.

12. It is relevant that in the two rounds of diplomatic consultations on the present dispute, Germany at no time argued that this was a matter within its domestic jurisdiction[72]. Instead, it sought to justify its conduct as valid and lawful under international law, or at any rate as involving an arguable construction of the Settlement Convention. The issue was not whether this was a matter for Germany alone, but whether neutral property seized as a result of a war could be treated by German courts as "German external assets" which were "seized for the purpose of reparation or restitution"[73] as a result of the Second World War.

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[70] CR 2004/24, pp. 33 and 34, paras. 93 and 97 (Professor Frowein). See also POG, p. 65, para. 109. See also Bundesverfassungsgericht (German Federal Constitutional Court), decision of January 28, 1998 in the proceedings concerning the constitutional complaint of Prince Hans Adam II of Liechtenstein - 2BvR 1981/97 - II, 1 of the Reasons for the decision.

[71] *I.C.J. Reports 1960*, pp. 32-33.

[72] See report, second round of bilateral consultations on 14 June 1999 in Vaduz in the matter "Decision of the German Bundesverfassungsgericht (Federal Constitutional Court) of 28 January 1998 (Kalkofen Judgment)", Observations, document deposited in the Registry of the Court according to Article 50 (2) of the Rules of Court, 15 November 2002. The first round of talks in this matter had taken place in Bonn on 10 July 1998.

[73] See Article 3, para. 3, and para. 1 of Chapter 6 of the Settlement Convention regarding "German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war . . .".

13. Finally, Germany argues that its courts did not definitively decide that the Czech position on the Settlement Convention was correct; they merely deferred to it, as they were obliged to do under the Convention. But, whether one State must defer to the alleged views of a second State on such a question, in face of the claim of a third State, is transparently one which arises on the plane of international law. It is not a matter within the domestic jurisdiction of the forum State.

Mr. President, Members of the Court, I wonder whether it would now be suitable to have the usual short break. After the break, would you be kind enough to call upon my colleague and friend Professor Bruha. Thank you very much for your kind attention.

The PRESIDENT: Thank you, Professor Blumenwitz.

The Court will now adjourn for ten minutes, after which I will call on Professor Bruha to take the floor.

The Court adjourned from 11.15 to 11.30 a.m.

The PRESIDENT: Please be seated. I now give the floor to Professor Bruha.

Mr. BRUHA:

7. Germany's fourth Preliminary Objection

1. Mr. President, distinguished judges, it is a great honour and a personal pleasure for me to appear for the first time before this Court. I shall deal with the fourth Preliminary Objection of Germany, which is that Liechtenstein has not sufficiently substantiated its claims.

2. In the oral pleadings on Monday, my esteemed colleague Professor Tomuschat, among others, reshaped the Liechtenstein case into one entirely different from the one actually before you. In these circumstances, it is not surprising that he finds insufficient substantiation. If it were Liechtenstein's case that Germany must be, in the words of Professor Tomuschat, "held responsible for the financial losses suffered by Liechtenstein in 1945 at the hands of the Czechoslovak authorities"[74], then substantiation could have posed a problem. But as has already been explained, the nature of Liechtenstein's case is entirely different.

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[74] CR 2004/24, p. 35, para. 102 (Professor Tomuschat).

3. In other words, Germany argues we have not substantiated *their* case. But we have substantiated *our* case, as I will show.

4. I will make two main points on substantiation. First, Liechtenstein's Application meets the requirements of the Court's Statute and Rules. Secondly, despite Germany's increasingly dramatic protests on Monday, Germany transparently understands the object and scope of Liechtenstein's claims. Thirdly, if there were in fact a lack of sufficient evidence for our case, which there is not, this would not be a preliminary matter but instead a question for the merits phase.

A. Liechtenstein's Application meets the requirements of the Court's Statute and Rules

5. Professor Tomuschat described the Application as being "tainted by such profound flaws" that the minimal requirements set out in Article 40 (1) of the Statute and Article 38 (2) of the Rules "cannot be deemed to have been met"[75].

6. But, Mr. President, Members of the Court, Article 40 (1) of the Statute and Article 38 (2) of the Rules of Court do not require an exhaustive statement of facts and grounds on which the claim is based in the application, but only a "succinct" one. This Court made this clear in the *Cameroon/Nigeria* case[76]. This is precisely what the Application does in the present case. It contains "a succinct statement of the facts and grounds on which the claim is based" and provides — I cite my colleague Professor Tomuschat — at least a "prima facie"[77] overview of the factual and legal issues to be argued and developed in the course of the proceedings. Liechtenstein has clearly indicated the underlying grounds for its claims against Germany, by describing the series of judicial decisions, subsequent conduct, and diplomatic exchanges, as well as the underlying factual and historical background. Similarly, it has set out the main legal grounds on which its claim is based.

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[75] CR 2004/24, p. 35, para. 100 (Professor Tomuschat).

[76] See *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 318, para. 98.

[77] CR 2004/24, p. 38, para. 106 (Professor Tomuschat).

B. Germany understands the object and scope of the present dispute

7. I turn to my second point. Professor Tomuschat opened his intervention on Monday by stating dramatically that there is such a "definite and incurable lack of substantiation" in Liechtenstein's Application that Germany cannot even "organize its defence"[78]. But the detailed way in which Germany has prematurely defended itself on the merits of our claims in its Preliminary Objections and again on Monday belies this accusation.

8. Many of Germany's observations patently go to the merits. To mention a few of these, in its Preliminary Objections, Germany contends that Liechtenstein has not demonstrated any interference by Germany with the Liechtenstein property[79], that it has distorted the German case law concerning the Settlement Convention of 1952[80], that it has improperly substantiated its claim as far as it invokes diplomatic protection[81], and that it has not established any violation of Liechtenstein's neutrality and sovereignty[82].

9. Mr. President, honourable Members of the Court, if these contentions have any relevance at all to the present stage of the proceedings, it is only to demonstrate that Germany evidently has no serious problem in understanding the claim. For example, Germany states in its Preliminary Objections:

> "Liechtenstein contends . . . that it . . . suffered direct damage through the *conduct of German authorities, primarily its courts*. It claims that Germany violated its sovereignty as an independent third State as well as its status of neutrality during the Second World War."[83]

Such a statement shows without the shadow of a doubt that Germany has understood the Application. Germany has clearly grasped that it is Germany's treatment of Liechtenstein property as German external assets under the Settlement Convention — in the 1990s and entirely as a result of German court decisions, subsequently endorsed by the German authorities — which is the cornerstone of the present dispute. Germany clearly grasps that this constitutes the internationally wrongful act of which Liechtenstein complains, and that this is the "very essence" of the present dispute.

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[78] CR 2004/24, p. 35, para. 100 (Professor Tomuschat).

[79] Preliminary Objections of Germany (POG), paras. 121-124; CR 2004/24, pp. 35-36, para. 102 (Professor Tomuschat).

[80] *Ibid.*, paras. 125-130; CR 2004/24, p. 37, para. 105 (Professor Tomuschat).

[81] *Ibid.*, paras. 131-142; CR 2004/24, pp. 40-41, paras. 110 and 111 (Professor Tomuschat).

[82] *Ibid.*, paras. 143-149; CR 2004/24, p. 44, para. 120 (Professor Tomuschat).

[83] *Ibid.*, para. 143.

10. Equally, it is not open to Germany to argue, at this preliminary stage, that it is not able to "organize its defence". Even if they could be heard to say this, the difficulty only arises for them because they have in mind a particular defence to a case which is not Liechtenstein's actual case. This is revealed by Germany's rather specific complaints of lack of substantiation. In the Preliminary Objections and again on Monday, we heard about the following alleged deficiencies in the Liechtenstein case:

— the attribution to Germany of the losses sustained by Liechtenstein and its nationals[84];

— the reality and nature of these losses[85];

— the interpretation of the jurisprudence of the German courts[86];

— the conclusion to be drawn from Germany's endorsement of this case law[87]; and fifthly,

— the violation of Liechtenstein's neutrality and sovereignty[88].

These examples merely serve to reinforce the fact that the aspects referred to clearly belong to the merits phase, not its admissibility.

C. Lack of sufficient evidence is not a preliminary matter

11. I come to my last point — lack of sufficient evidence is not a preliminary matter. Once the claimant State has met the threshold of substantiation set out in the Court's Statute and Rules, which Liechtenstein has done, the respondent State may not properly ask, by way of preliminary objections, for more and more factual evidence. The test of the sufficiency and validity of a claim are to be met, as relevant, at the merits and quantum phases, not at the phase of preliminary objections.

12. It is true that Germany has consistently complained about the level of detail provided by Liechtenstein in relation to the identity and nationality of the owners of the confiscated property.

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[84] CR 2004/24, p. 37, para. 105 (Professor Tomuschat); POG, paras. 119-120.

[85] *Ibid.*, p. 38, para. 106 (Professor Tomuschat) and pp. 56-57, para. 146 (Professor Dupuy); POG, paras. 138-142.

[86] *Ibid.*, pp. 36-37, para. 104 (Professor Tomuschat); POG, paras. 123 and 125.

[87] *Ibid.*, pp. 36-37, para. 104 (Professor Tomuschat); POG, paras. 126-128.

[88] *Ibid.*, p. 44, para. 120 (Professor Tomuschat); POG, paras. 143-149.

On Monday, Professor Tomuschat repeatedly charged Liechtenstein with failing to identify all of the Liechtensteiner victims and their assets affected by its allegedly wrongful acts, and concluded that we have failed to articulate any basis for the exercise of diplomatic protection. But this is not the case.

13. In Annex 49 to its Memorial, Liechtenstein provided Germany with its list of persons who were the victims of the 1945 confiscation measures in Czechoslovakia. Moreover, as explained in the Memorial[89], the vast majority of the property confiscated was that of the reigning Prince of Liechtenstein and his family. Germany itself acknowledges that, as far as the Prince is concerned, it has sufficient information in order to present its defence. As a courtesy for both Germany and the Court, Liechtenstein annexed to its Observations its updated list of victims[90] as well as details of the confiscated assets. Whether Liechtenstein is now in a position to prove in all cases the existence of heirs of Liechtenstein nationality[91] does not matter. At the admissibility stage, it suffices that even one person on the list possesses Liechtenstein nationality and so falls into the category of persons eligible for diplomatic protection. This is indisputably the case as to the Prince, and to most other persons on the list.

14. In the *Cameroon/Nigeria* case, Nigeria made a similar objection to aspects of Cameroon's Application, an objection which the Court dismissed in the following words:

> "As regards the meaning to be given to the term 'succinct', the Court would simply note that Cameroon's Application contains a sufficiently precise statement of the facts and grounds on which the Applicant bases its claim. That statement fulfils the conditions laid down in Article 38, paragraph 2, and the Application is accordingly admissible. This observation does not, however, prejudge the question whether, taking account of the information submitted to the Court, the facts alleged by the Applicant are established or not, and whether the grounds it relies upon are founded or not. Those questions belong to the merits and may not be prejudged in this phase of the proceedings.[92]"

In Liechtenstein's respectful submission exactly the same considerations apply here.

15. Mr. President, Members of the Court, before closing let me make two ancillary points.

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[89] See e.g. Memorial, paras. 1.20-1.21.

[90] Observations of Liechtenstein (OL), 15 Nov. 2002, Ann. 49.

[91] CR 2004/24, p. 40, para. 110 (Professor Tomuschat).

[92] *Land and Maritime Boundary between Cameroon and Nigeria, Judgment, I.C.J. Reports 1998*, para. 100.

16. First, I should refer to Article 53 (1) of the Statute, which provides that: "Whenever one of the parties does not appear before the Court, *or fails to defend its case*, the other party may call upon the Court *to decide in favour of its claim*". It goes without saying that by "deciding in favour" of the requesting party the Court is called upon to pass a judgment on the merits. By analogy the expression "fails to defend its case" can be transposed to a situation where a State presents a claim but does not substantiate it. In such a case, it belongs to the Court to decide in favour of the other party on the points which have not been substantiated to its satisfaction. But this must be done at the merits stage, when the Court has the opportunity of hearing the parties present their cases in full, and not as a matter of admissibility. Indeed, in such a case in which the claimant State has failed, despite having argued its case *in extenso*, to establish necessary factual elements to the Court's satisfaction, on those points the respondent State is entitled to judgment on the merits by way of a *res judicata*, definitively resolving those aspects of the matter once and for all. This is something which the Court cannot do at the preliminary objections stage; it cannot give judgment on the merits when the merits are suspended in accordance with Article 79 (5) of the Rules of Court.

17. Secondly, I should refer — as the Court did in the *Cameroon/Nigeria* Judgment — to the right of the Applicant, until the end of the proceedings, to make later additions to the statement of the facts and grounds on which a claim is based, a right acknowledged by this Court in its jurisprudence[93]. The only limit is "that the result is not to transform the dispute brought before the Court into another dispute which is different in character"[94]. But Germany does not allege that Liechtenstein has so transformed the dispute in the present case.

Conclusion

18. Mr. President, Members of the Court, in conclusion, Liechtenstein's arguments on the alleged lack of substantiation may be summarized in two simple propositions:

(i) First, the substantiation in the Application meets the requirements of the Statute and the Rules of Court.

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[93] *Land and Maritime Boundary between Cameroon and Nigeria, Judgment, I.C.J. Reports 1998*, p. 318, para. 98.

[94] *Ibid.*, pp. 318-319, para. 99; see also *e.g.* PCIJ, Judgment, 15 June 1939, *Société Commerciale de Belgique, Series A/B, No. 78*, p. 173 or ICJ, Judgment, 21 Nov. 1959, *Interhandel, I.C.J. Reports 1959*, p. 21.

(ii) Secondly, Germany's fourth Preliminary Objection is unfounded, as Liechtenstein has properly substantiated its claims in law and in fact.

Mr. President, honourable Members of the Court, thank you for your attention. Mr. President, I would ask you to call upon Professor Hafner to continue Liechtenstein's presentation.

The PRESIDENT: Thank you, Professor Bruha. I now give the floor to Professor Hafner.

Mr. HAFNER:

8. Exhaustion of local remedies

A. Introduction

1. Mr. President, Members of the Court. It is a great honour for me to appear today for the first time before this honourable Court.

2. The purpose of my intervention is to address the sixth Preliminary Objection of Germany, namely the contention that Liechtenstein's claims are inadmissible due to the non-exhaustion of local remedies. I will show that there are three grounds on which it can be concluded that this German objection is totally unfounded.

3. In the present proceedings, Liechtenstein raises claims against Germany primarily on its own account, and additionally on account of its citizens. As to the former — the claims brought by Liechtenstein directly on its own account, or the so-called "direct claims" — I will first demonstrate that the local remedies rule does not apply. With regard to diplomatic protection, the position is different. Even if the rule were applicable in such cases, I will secondly show that there were no local remedies available in Germany for Liechtenstein nationals in the present dispute. And thirdly, I will deal with the paradoxical German argument that the Liechtenstein nationals would have been required to exhaust local remedies in Czechoslovakia for violations suffered in Germany.

B. The local remedies rule is not applicable in that the claims submitted by Liechtenstein are predominantly claims for direct injury

4. Mr. President, Members of the Court, permit me now to turn to the first issue, that concerning the direct injuries suffered by Liechtenstein — an issue that Germany did not find necessary to discuss in its oral pleadings. In its Application[95] Liechtenstein raises claims against Germany primarily on its own account, as Germany's conduct directly violated Liechtenstein's own rights as a sovereign State and as a State which was neutral during the Second World War.

5. It is generally accepted that the local remedies rule is restricted to cases of diplomatic protection, but is not applicable to cases where a State is *directly* injured in its State-to-State rights. This distinction was endorsed by this Court in the *Interhandel*[96] and *ELSI*[97] cases and is unanimously accepted in international judicial and arbitral practice[98] as well as in doctrine[99]. This Court had a recent opportunity to decide on this issue in the *Avena* case and I will return to this case shortly.

6. Germany has time and again deliberately misstated Liechtenstein's claim. It consistently ignores the fact — even in its oral pleadings — that these two forms of direct injury caused to Liechtenstein by Germany, namely the injury to Liechtenstein's sovereignty and violations of the law of neutrality, form the essential part of Liechtenstein's claim. By ignoring this aspect of Liechtenstein's claims concerning direct injury, Germany makes a further attempt to present the case as being different to that which Liechtenstein is actually pleading.

7. That the local remedies rule is not applicable in cases of violation of the laws on neutrality has been recognized in practice; the Liechtenstein observations[100] quote a substantial number of cases and practice to this effect so that there is no need to repeat them here.

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[95] See also ML, Chap. 4.

[96] *I.C.J. Reports 1959*, p. 28.

[97] *I.C.J. Reports 1989*, para. 52.

[98] The M/V "Saiga" (No. 2) case, ITLOS 1997, reprinted in *International Legal Materials*, Vol. 38, 1999, p. 1323, para. 98; Air Service Agreement Arbitration, 1978, 18 United Nations, *Reports of International Arbitral Awards*, p. 431, para. 30; case concerning the *Heathrow Airport User Charges*, 1992, 102 *ILR*, p. 279.

[99] T. Meron, The Incidence of the Rule of Exhaustion of Local Remedies, *British Year Book of International Law* 35, 1959, 84-88; C. F. Amerasinghe, Local Remedies in International Law 108-132, 1990; Dugard, Second report on diplomatic protection, United Nations Doc. A/CN.4/514, paras. 21-23; S. Wittich, Direct Injury and the Incidence of the Local Remedies Rule, *Austrian Review of International and European Law* 5, 2000, 121.

[100] Observations, paras. 6.26-6.32.

8. Liechtenstein also claims that its sovereignty was injured by Germany, in that the latter extended the scope of the Settlement Convention, which according to its terms is restricted to German external assets only, to include the Liechtenstein assets as well. That such conduct amounts to a violation of a State's sovereignty is widely accepted in the doctrine, including the German doctrine[101].

9. Many international disputes contain elements of both diplomatic protection and direct injury, and the present case is of such a "mixed nature". This ensues from the fact that more than one concurrent rule of international law may be breached by one and the same conduct. If one examines Liechtenstein's submissions as a whole, in particular as set out in the Memorial[102], it will readily be seen that the direct injury inflicted by Germany upon Liechtenstein in violating Liechtenstein's sovereignty and neutrality is essential to Liechtenstein's claim. In this regard, Liechtenstein's claim is similar to that brought by the United States against Iran in the *Diplomatic and Consular Staff* case[103]. The Court considered the United States claim to be one of direct injury, even though private individuals were also affected by the violation. Likewise, in the *Nicaragua* case[104], Nicaragua claimed reparations as *parens patriae* for its citizens and, thus, exercised diplomatic protection. Again, no Nicaraguan citizen was required to exhaust local remedies before Nicaragua could pursue its claim.

10. The most recent case where this view was endorsed is the *Avena* case[105]. Mr. President, Members of the Court, in your Judgment on the *Avena* case you asserted that Mexico based its claims not solely on the injuries caused to the Mexican individuals, but also on the injuries "it has

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[101] Hermann Weber, *Anmerkung zur "Liechtenstein-Entscheidung" des Bundesverfassungsgerichts vom 28 Januar 1998*, 36 Archiv des Völkerrechts 188, 192 (1998); K. Doehring, Völkerrechtswidrige Konfiskation eines Gemäldes des Fürsten von Liechtenstein als "deutsches Eigentum". Ein unrühmlicher Schlusspunkt, 18 Praxis des Internationalen Privat- und Verfahrensrechts 1998, p. 466; Ignaz Seidl-Hohenveldern, *Völkerrechtswidrigkeit der Konfiskation eines Gemäldes aus der Sammlung des Fürsten von Liechtenstein als angeblich "deutsches" Eigentum*, 16 Praxis des Internationalen Privat- und Verfahrensrechts 410 (1996); *id.*, *Nachwirkung der Kontrollratsgesetzgebung und die deutsche Souveränität — Zu den Urteilen über die "Bodenreform" und zur Fortgeltung des Klagestops nach dem Überleitungsvertrag*, in "Liber Amicorum Günther Jaenicke — Zum 85. Geburtstag" 975, 983-4 (V. Götz/P. Selmer/R. Wolfrum eds. 1998).

[102] ML, pp. 87-108.

[103] *Diplomatic and Consular Staff, Judgment, I.C.J. Reports 1980*, p. 6.

[104] *Military and Paramilitary Activities in and Against Nicaragua, Judgment, I.C.J. Reports 1986*, p. 19.

[105] Case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, Judgment of 31 March 2004, paras. 40 *et seq.*

itself suffered, directly and through its nationals". This direct injury resulted from the violation by the United States of the obligations under Article 36 of the Vienna Convention on Consular Relations of 1963. The Judgment emphasized that the duty to exhaust local remedies did not apply. For these reasons, you did not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection, so that you dismissed this objection by the United States to admissibility[106]. This Judgment corroborates that, despite the mixed nature of a claim raised in a dispute between two States, the direct injury suffered by a State suffices to dispose of the necessity to exhaust the local remedies.

11. For these reasons, the nature and subject-matter of the present dispute and the legal relationship of the norms and obligations invoked by Liechtenstein and breached by Germany essentially concern direct rights of Liechtenstein. Therefore, since Liechtenstein has suffered injury in it own rights, and the local remedies rule is not applicable.

C. The exercise of diplomatic protection

12. Notwithstanding the inapplicability of the local remedies rule, I will nevertheless deal with the two arguments relating to the exhaustion of local remedies which were raised by Germany as legal impediments to the admissibility of Liechtenstein's claims: on the one hand, the futility of local remedies, on the other, the flawed argument as to the exhaustion of local remedies in Czechoslovakia, or now in the Czech Republic.

13. Even if and in so far as the local remedies rule were considered to be applicable to the present claim, there is no ground for denying the admissibility of the claim before this Court. Germany quite correctly concedes, and my learned colleague Professor Tomuschat confirmed last Monday[107] that, as far as the Pieter van Laer painting is concerned, local remedies have been exhausted. Germany itself asserted that decisions of the Federal constitutional court that had dealt with this matter cannot be challenged any more within the German legal system[108]. These German

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[106] *Ibid.*

[107] CR 2004/24, p. 58, para. 148 (Professor Tomuschat).

[108] POG, para. 191.

statements leave no room for any doubt that the requirement of the exhaustion of local remedies was fully complied with at least in relation to that particular item of property.

14. However, with regard to other Liechtenstein property, its owners do not need to exhaust local remedies when those remedies are ineffective, the exercise of exhausting such remedies would be futile or the opportunity to do so does not exist. This view is confirmed in case law as well as in doctrine quoted *in extenso* in Liechtenstein's Observations[109]. In the recent work of the International Law Commission on diplomatic protection, this exception to the rule of exhaustion of local remedies met with overwhelming support that reflects a general conviction concerning the existence of such an exception[110].

15. Indeed, any recourse to local remedies in Germany by Liechtenstein nationals would be futile. Can a Liechtenstein citizen reasonably be expected to resort to German local remedies if the Constitutional Court already delivered a negative decision in a case of the same kind? No Liechtenstein national applying to a German court would obtain a decision different from that of the Federal Constitutional Court in the *Pieter van Laer* case. Once the Federal Constitutional Court had reached a decision, no other decision can be expected from another German court in cases relating to subjects involving the same legal reasoning.

16. The rule that there is no obligation to resort to domestic remedies if a different decision could not reasonably be expected has gained overwhelming recognition in international judicial practice, as well as in international authorities[111].

17. As, for instance, the Human Rights Committee repeatedly has stated, wherever the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts, domestic remedies need not be exhausted in any similar case in the future[112]. Likewise, the Commission under the European Convention on Human Rights has established a consistent practice according to which "une

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[109] Observations, paras. 6.7-6.11.

[110] Report of the International Law Commission on the work of its 54th session 2002 (United Nations doc. A/57/10), p. 139, para. 181.

[111] See for instance John Dugard, Third report on Diplomatic Protection, United Nations doc. A/CN.4/523, p. 16.

[112] *Länsman et al.* v. *Finland*, Communication No. 511/1992, United Nations doc. CCPR/C/52/D/511/1992 (1994).

jurisprudence bien établie peut constituer une circonstance particulière de nature à dispenser un requérant, selon les principes de droit international généralement reconnus, d'épuiser les voies de recours internes"[113]. In other words, it is not necessary to have recourse to domestic tribunals if the result must inevitably be the repetition of a decision already pronounced.

18. That no other decision in Germany can reasonably be expected transpires also from the discussions between representatives of Germany and Liechtenstein. In these discussions, the German delegation pointed out that the German executive had taken cognizance of the decision of its supreme court. They said they were bound by that decision — and would also be bound in relation to any future cases[114].

19. Furthermore, Germany asserted the non-existence of available local legal remedies. As Professor Tomuschat reiterated last Monday[115], Germany justified this non-existence by arguing that the claim affects immovable property situated outside German jurisdiction and that "only the local judiciary is competent to rule on issues connected with the ownership of real estate"[116]. However, this legal reasoning is irrelevant for the present dispute, since Germany denied the jurisdiction of German courts on a different ground, namely by applying Article 3 of Section VI of the Settlement Convention. Germany could do so only because it declared Liechtenstein property as belonging to "German external assets" for the purposes of the Settlement Convention.

20. In any event, this additional German argument only corroborates the non-existence of local remedies in Germany to which Liechtenstein citizens could have resorted.

21. For all these reasons, a failure to exhaust local remedies can under no circumstances be invoked by Germany as a bar to the admissibility of Liechtenstein's claim.

D. Germany's reference to local remedies in Czechoslovakia

22. Finally I turn to the rather bizarre argument raised by Germany that Liechtenstein citizens should have resorted first to judicial devices in former Czechoslovakia before

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[113] *A et al.* v. *Germany*, Appl. N. 899/60, Collection, Vol. 9, p. 9.

[114] ML, para. 3.51.

[115] CR 2004/24, p. 59, para. 152 (Professor Tomuschat).

[116] POG, p. 59, para. 193.

Liechtenstein could exercise diplomatic protection against Germany on their behalf[117]. In his oral pleading, Professor Tomuschat focused on this argument that he qualified a "juridical innovation"[118]. Nevertheless, in Liechtenstein's view, such a legal requirement cannot be maintained.

23. This argument must fail. It must fail, because the idea behind the local remedies rule — and Professor Tomuschat stated it quite rightly[119] — is to allow the State to bring *its own* conduct towards that individual into conformity with what is required by international law. For this reason alone, it is only German courts which could have been resorted to in order to produce such an effect. It would be totally foreign to the system of diplomatic protection if the exercise of this right were made dependent on the exhaustion of local remedies of a State *other than that which had breached its international obligations or where the breach has occurred*. In particular, judgments of Czechoslovak courts could not have achieved the objective of the principle of exhaustion of local remedies, namely to make good the wrongfulness of the acts of *Germany*. It is totally irrelevant for the present case whether Liechtenstein citizens resorted to Czechoslovak courts. And it is very illustrative that Germany was not able to substantiate its argument by any precedent case. In this context, my learned colleague Tomuschat advanced the argument that "les ressortissants du demandeur, qui a endossé leurs réclamations, auraient pu empêcher les préjudices qui leur ont été infligés en ayant recours aux moyens disponibles dans l'Etat qui a causé les préjudices"[120]. Whatever the value of this argument may be, its reasoning is not defensible since it was Germany that caused the injuries of which Liechtenstein complains in this case and the decision of the Constitutional Court made any further local remedies redundant.

24. In this context, Professor Tomuschat tried to minimize Germany's conduct by qualifying it as "marginal"[121]. Whether Germany's conduct was "marginal" is a matter of subjective

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[117] CR 2004/24, p. 59, paras. 151 *et seq.* (Professor Tomuschat).

[118] *Ibid.*, p. 59, para. 151 (Professor Tomuschat).

[119] *Ibid.*, p. 59, para. 151 (Professor Tomuschat).

[120] *Ibid.*, p. 60, para. 153 (Professor Tomuschat).

[121] *Ibid.*, p. 60, para. 153 (Professor Tomuschat).

appreciation; what for one State seems only marginal could for another be a matter of substantial importance. What does, however, matter in this case is whether the conduct is in conformity with international law.

E. Conclusion

25. Mr. President, Members of the Court, in the light of all these considerations, the rule of exhaustion of local remedies does not form a legal obstacle to the admissibility of this case before the Court.

- First, the rule of local remedies does not apply to the present case, as the claim is made in respect of injuries predominantly suffered by the State of Liechtenstein itself.
- Second, even if the rule of exhaustion of local remedies were considered in principle applicable, this principle has been fully complied with as in the light of the decision on the *Pieter van Laer Painting* no local remedies were available anyway.
- Third, the argument put forward by Germany that Liechtenstein citizens should have resorted first to judicial devices in former Czechoslovakia before Liechtenstein could exercise diplomatic protection against Germany can under no circumstances be regarded as valid.

26. For these reasons Liechtenstein submits that the arguments raised by Germany with regard to the principle of the exhaustion of local remedies have to be dismissed. Now, I would like to ask you, Mr. President, to call on Professor Pellet in order to conclude the oral pleading. Thank you.

The PRESIDENT: Thank you, Professor Hafner. I now give the floor to Professor Pellet.

M. PELLET : Thank you, Mr. President.

9. L'exception allemande fondée sur l'absence à l'instance des Etats successeurs de la Tchécoslovaquie

Monsieur le président, Madame et Messieurs les juges,

1. Il me revient de réfuter l'exception d'irrecevabilité que l'Allemagne croit pouvoir tirer de l'absence à l'instance des Etats successeurs de l'ancienne Tchécoslovaquie, la République tchèque

et la République slovaque — bien que cette dernière soit, bizarrement, négligée par nos contradicteurs.

2. J'indique d'ailleurs d'emblée qu'étant donné que l'argumentation du Liechtenstein sur ce point ne dépend en aucune façon de la manière dont le problème de la succession d'Etats pourrait être posé et résolu, je parlerai indifféremment de «la Tchécoslovaquie» ou des «Etats successeurs» à celle-ci, ou des «Républiques slovaque et tchèque» : quelle que puisse être leur part dans la succession, ces deux Etats ne sont, de toutes façons, pas concernés par l'affaire dont la Principauté de Liechtenstein a saisi la Cour.

3. L'Allemagne le conteste en affirmant que «les demandes du Liechtenstein obligeraient la Cour à statuer sur les droits et obligations de la République tchèque en son absence et sans son consentement»[122]. Les deux premières exceptions d'incompétence relatives d'une part à la prétendue inexistence de tout différend entre les Parties à la présente procédure et, d'autre part, à l'absence supposée de compétence de la Cour *ratione temporis*, vont d'ailleurs, sous une autre forme, dans le même sens. Mon fréquent collègue et néanmoins toujours ami, James Crawford, a déjà montré ce matin que la Cour ne pouvait s'arrêter à ces objections; j'y reviendrai inévitablement; mais sous un angle différent.

4. En ce qui me concerne, il m'appartient de traiter plus particulièrement de l'usage que l'Allemagne tente de faire de la jurisprudence de l'*Or monétaire*. Pour faire court, il me semble qu'elle en fait une analyse convenable, mais une application à l'espèce totalement biaisée et inacceptable.

5. Pour ce qui est du premier point, l'analyse, le professeur Dupuy, avant-hier, a fort bien résumé votre jurisprudence[123]; il est inutile que j'y revienne : je ne ferais sûrement pas mieux, et la leçon d'agrégation n'est pas un genre dans lequel j'excelle. Du reste, ces développements n'étaient pas vraiment nécessaires : comme le Liechtenstein l'avait déjà indiqué dans ses observations[124], il

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[122] Exceptions préliminaires (ci-après : EP), p. 93; repris *in* CR 2004/24, p. 45 (Dupuy).

[123] CR 2004/24, p. 49-53, par. 132-137.

[124] P. 75, par. 5.4.

n'y a pas de désaccord entre les Parties à cet égard et nous pouvons souscrire aux conclusions que l'Allemagne tire de l'arrêt de 1954, éclairé par les affaires de *Nauru*[125] et du *Timor oriental*[126] :

> «The jurisprudence of the Court concerning the indispensability of third parties is crystal clear : *If* [and I stress this first «if»] the legal interests of a third State constitute the «very subject-matter» of a dispute brought to the Court and the third State is absent from the proceedings, the Court cannot exercise jurisdiction on the matter. Legal interests of a third State do constitute the very subject-matter of a dispute *if* [and this is an important second «if»] the Court cannot decide on the claims before it without prior determination as to the rights or obligations of the third State.»[127]

6. Là s'arrête cependant l'accord des Parties. Car les deux *«if»*, les deux «si», constituent des conditions *sine qua non* à l'accueil d'une exception préliminaire fondée sur la règle dite de «la partie indispensable». Or, contrairement aux allégations de l'Allemagne, en l'espèce, ni l'une ni l'autre de ces conditions (qui sont peut-être des manières différentes de dire la même chose) ne sont remplies.

7. En outre, la Partie allemande néglige complètement «l'autre versant» de la jurisprudence de l'*Or monétaire*, ce que l'on pourrait appeler son aspect «positif», en ce sens qu'il en résulte aussi que la Cour a non seulement le droit, mais aussi le devoir de se prononcer sur la requête, lorsque les droits d'un Etat tiers ne sont pas «l'objet même» de l'arrêt à intervenir, et quand bien même les intérêts de cet Etat tiers pourraient être «touchés»[128] ou un «intérêt d'ordre juridique» pourrait être pour lui «en cause»[129] ou si, comme dans l'affaire de *Nauru*, la décision de la Cour risquait d'«avoir des incidences sur la situation juridique des deux autres Etats concernés»[130]. Tel est le cas en la présente espèce dans laquelle, contrairement aux dires de l'Allemagne, ni l'illicéité des «décrets Beneš», ni le droit à des réparations de guerre de la Tchécoslovaquie, ne sont, en aucune manière, «l'objet même» de la présente procédure (A et B). C'est à ces deux points que je

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[125] Arrêt du 26 juin 1992, *Certaines terres à phosphates à Nauru (exceptions préliminaires)*, *C.I.J. Recueil 1992*, p. 259-262, par. 50-55.

[126] Arrêt du 30 juin 1995, *C.I.J. Recueil 1995*, p. 101-105, par. 26-34.

[127] EP, p. 103.

[128] Cf. arrêts du 15 juin 1954, *Or monétaire pris à Rome en 1943*, *C.I.J. Recueil 1954*, p. 32 ou du 13 septembre 1990, *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras) — requête à fin d'intervention*, *C.I.J. Recueil 1990*, p. 116, par. 55.

[129] Cf. l'article 62 du Statut ou l'arrêt du 30 juin 1995, *Timor oriental*, *C.I.J. Recueil 1995*, p. 104, par. 34.

[130] Arrêt du 26 juin 1992, *Certaines terres à phosphates à Nauru*, *C.I.J. Recueil 1992*, p. 261, par. 55.

m'attacherai d'abord, avant d'en venir aux conséquences qui en résultent en ce qui concerne la compétence de la Cour (C).

A. L'illicéité des décrets Beneš n'est pas «l'objet même du litige»

8. Monsieur le président, selon mon contradicteur et ami Pierre-Marie Dupuy, la République tchèque est, dans la présente affaire, une tierce partie indispensable car, affirme-t-il : «la détermination du caractère, licite ou illicite, des faits d'expropriation imputables à la Tchécoslovaquie est, en elle-même, un ***préalable indispensable*** à l'appréciation de la situation de l'Allemagne par rapport aux décrets Beneš»[131]. Cette affirmation repose sur une distorsion totale de la question dont le Liechtenstein a saisi la Cour. Et cela m'oblige à revenir une nouvelle fois sur l'objet même du différend que, volontairement ou non, l'Allemagne s'obstine à déformer.

9. Le Liechtenstein a un différend avec les successeurs de l'ancienne Tchécoslovaquie et n'en fait nullement mystère. Il considère qu'il a été (et que nombre de ses ressortissants ont été) victime(s) des décrets Beneš de 1945 qui ont entraîné la confiscation injuste des avoirs liechtensteinois assimilés à tort à des biens allemands. Mais ce différend qu'il a avec les Etats successeurs de la Tchécoslovaquie est tout à fait distinct de celui qui fait l'objet de la présente procédure :

— les Parties sont autres, cela va de soi; et,

— surtout, leur objet est distinct.

10. Dans sa plaidoirie de lundi dernier, le professeur Dupuy s'est employé à dresser un parallèle entre l'affaire de ***l'Or monétaire*** et celle qui nous occupe, entre lesquelles il a cru pouvoir déceler une «très grande similitude»[132]. Mais cette similitude n'existe que si, comme mon contradicteur, on se trompe de différend; si l'on postule que le Liechtenstein vous demande, Madame et Messieurs les juges, de condamner la Tchécoslovaquie «à travers» l'Allemagne ou celle-ci en lieu et place des successeurs de celle-là. C'est ce que, tel le chat botté des frères Grimm, dont il est un lecteur assidu, le professeur Dupuy voudrait vous faire croire. Mais ce n'est pas

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[131] CR 2004/24, p. 53, par. 139; les italiques sont dans le texte.

[132] *Ibid.*, p. 50, par. 133.

mieux établi que ne l'étaient les vastes propriétés que le rusé félin attribuait à son maître, le marquis de Carabas.

11. Or, ce que la Principauté reproche à l'Allemagne, ce n'est pas d'avoir confisqué certains biens liechtensteinois, ni, moins encore, bien évidemment, l'illicéité des décrets qui ont été à l'origine de cette confiscation. Contrairement aux allégations du professeur Dupuy qui, à trop lire Grimm, en vient à faire preuve d'une imagination qui ne le cède en rien à celle des célèbres conteurs, ce n'est pas la «responsabilité internationale» de la République tchèque «qui est en cause en tant qu'Etat successeur de la Tchécoslovaquie»[133]. Et «[l]'Allemagne n'est pas accusée ... d'avoir reconnu illicitement des confiscations étrangères»[134]; elle nous dit d'ailleurs elle-même, avec insistance, par la voix autorisée de son agent, qu'elle continue à ne pas reconnaître la validité de ces décrets[135]. Aussi bien n'est-ce pas ce qui divise les Parties.

12. Comme l'ont montré l'agent du Liechtenstein et le professeur Crawford tout à l'heure, l'objet du présent différend est tout autre. Il avait déjà été exposé de manière concise au paragraphe 20 de la requête du Liechtenstein puis, de façon plus précise et détaillée, dans son mémoire[136] et, à nouveau, dans ses observations du 15 novembre 2002, notamment aux paragraphes 1.7 et 1.8, 4.6 à 4.9 et 5.15 et suivants; mais l'Allemagne s'acharne à croire — ou à vouloir — cet objet autre.

13. Il s'agit pourtant — et il s'agit exclusivement — de la décision, prise par l'Allemagne en 1995 et constamment maintenue depuis lors, de considérer les avoirs liechtensteinois comme tombant sous le coup de la convention de règlement du 26 mai 1952 amendée en 1954 :

— le 10 octobre 1995, le tribunal régional de Cologne a considéré que :

> «la disposition énoncée au paragraphe 3 de l'article 3 du chapitre sixième de la convention sur le règlement est applicable *mutatis mutandis* en l'espèce car elle vise manifestement à empêcher, sous quelque forme que ce soit, tout réexamen par les juridictions allemandes des mesures prises en vertu des paragraphes 1, 2 et 3 de l'article 3 du chapitre sixième de la convention sur le règlement»[137];

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[133] *Ibid.*, p. 49, par. 131.

[134] *Ibid.*, p. 54, par. 141.

[135] *Ibid.*, p. 13, par. 10, p. 19, par. 37 et p. 21, par. 42.

[136] Mémoire du Liechtenstein, p. 12-14, par. 13-16.

[137] Annexe 28 au mémoire du Liechtenstein (ci-après: «ML»), p. A260, par. 2, litt. *b) aa) [traduction du Greffe]*, p. 20 du texte français.

— à leur tour, la cour d'appel de Cologne, la Cour fédérale de justice puis la Cour constitutionnelle fédérale ont endossé cette position, à peu près dans les mêmes termes, par des décisions rendues respectivement les 9 juillet 1996[138], 25 septembre 1997[139] et 14 janvier 1998; pour ne citer que cette dernière décision : il s'agit, dit la Cour constitutionnelle, d'«une mesure prise à l'encontre *des avoirs allemands* à l'étranger au sens du paragraphe 1 de l'article 3 du chapitre sixième de la convention sur le règlement»[140];

— les autorités politiques ont fait leur cette thèse, qui contrastait totalement avec leurs positions antérieures, tant devant la Cour européenne des droits de l'homme que durant les négociations diplomatiques qui se sont déroulées entre les deux Etats.

14. Ces prises de position dépourvues d'ambiguïté sont présentées de manière assez détaillée aux pages 69 à 84 du mémoire du Liechtenstein. Je me bornerai à citer la déclaration de l'agent de l'Allemagne devant la Cour de Strasbourg, qui me paraît illustrer la position de ce pays :

> «le fait que les juridictions allemandes soient parties de l'hypothèse que les biens avaient été saisis à titre de biens allemands, n'est, en tous les cas, pas arbitraire et peut se défendre. L'article 3 du chapitre sixième de la convention sur le règlement est interprété trop strictement par le requérant si, par avoirs allemands à l'étranger, il entend les avoirs des citoyens allemands.»[141]

En réalité, Madame et Messieurs de la Cour : cette position *de l'Allemagne* ne peut nullement «se défendre»; et l'un des enjeux de la présente procédure est de le déterminer, lorsque vous serez conduits à examiner le fond de l'affaire.

15. Autrement dit, quelle qu'ait pu être sa position antérieure, depuis 1995, l'Allemagne considère que les avoirs de la Principauté et de ses ressortissants sont soumis au régime des réparations de guerre, au mépris et de la souveraineté du Liechtenstein, et de sa neutralité durant la seconde guerre mondiale. Pour en décider, comme le Liechtenstein le lui demande, la Cour n'a nul besoin de se prononcer sur la licéité des décrets Beneš. Celle-ci est indifférente aux fins du règlement du présent litige : que les décrets soient valides ou non, les biens liechtensteinois, que l'Allemagne estime maintenant soumis au régime des réparations, ne peuvent pas être soumis à ce

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[138] ML, annexe 29, voir note p. A309, par 2, *b) cc)*.

[139] ML, annexe 30.

[140] ML, annexe 32, p. A356, par. 1; traduction du Greffe, p. 45 du texte français; les italiques sont de nous.

[141] ML, annexe 36, p. A431, par. C.2 *a)*, traduction du Greffe, p. 15 du texte français.

régime et c'est ce que le Liechtenstein demande à la Cour de constater. La seule question qu'il vous pose, Madame et Messieurs les juges, est celle de savoir si l'Allemagne a pu, à bon droit, considérer les biens liechtensteinois comme relevant du régime des réparations de guerre. Vous pouvez y répondre sans vous interroger sur la conformité au droit international des décrets Beneš; cette autre question n'est ni «l'objet même»[142] du présent différend, ni une «condition préalable»[143] pour le trancher.

16. «Au pire», Monsieur le président — au pire pour nous, au mieux pour l'Allemagne — cette affaire pourrait être comparée à celle du *Détroit de Corfou* dans laquelle la Cour a estimé pouvoir condamner l'Albanie pour son manque de vigilance dans la surveillance du détroit alors même que le «délit principal» avait été commis par un autre Etat, absent de l'instance, la Yougoslavie. Ces deux faits internationalement illicites étaient à la fois liés et distincts, et la Cour a estimé qu'elle n'était pas empêchée de se prononcer sur l'un — le fait consécutif, les «graves omissions» de l'Albanie qui n'avait pas tenté de «prévenir le désastre»[144] — alors même qu'en l'absence de la Yougoslavie, il lui était impossible de se prononcer sur le fait illicite originaire, le minage du détroit. La Cour a considéré celui-ci comme une donnée de fait (qu'elle n'avait pas à qualifier juridiquement même s'il ne faisait aucun doute qu'il fût illicite), fait sur lequel s'est «greffé» un autre fait internationalement illicite dont elle a tenu l'Albanie responsable.

17. Dans ses observations, le Liechtenstein a invoqué ce précédent pour établir que le fait internationalement illicite qu'il reproche à l'Allemagne peut être reconnu comme tel par la Cour, sans qu'elle ait à s'interroger sur les violations imputables à un autre Etat[145]. Toutefois, à la réflexion, il me semble que, dans la présente affaire, la connexité entre le comportement de la Tchécoslovaquie d'une part, et celui de l'Allemagne d'autre part, est infiniment moins nette que les liens qui existaient entre la responsabilité de la Yougoslavie et celle de l'Albanie dans l'affaire du *Détroit de Corfou*. A l'inverse de la situation qui prévalait dans celle-ci, l'illicéité des faits attribuables à l'Allemagne est indépendante de celle du fait commis par la Tchécoslovaquie.

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[142] Arrêts, 15 juin 1954, *Or monétaire pris à Rome en 1943*, *C.I.J. Recueil 1954*, p. 32, 30 juin 1995, *Timor oriental*, *C.I.J. Recueil 1995*, p. 102, par. 28, et p. 104, par. 34.

[143] Arrêt du 26 juin 1992, *Certaines terres à phosphates à Nauru, exceptions préliminaires*, *C.I.J. Recueil 1992*, p. 261, par. 55.

[144] Arrêt du 9 avril 1949, *C.I.J. Recueil 1949*, p. 23.

[145] EP, p. 83-84, par. 5.22-5.23.

18. Cette dissociation est d'autant plus évidente que le fondement des mesures décidées par les décrets tchécoslovaques de 1945 n'est pas le régime des réparations de guerre. Les motifs des unes et les motifs des autres sont différents.

19. Qu'il s'agisse du décret n° 12 du 21 juin 1945[146] ou du décret n° 108 du 25 octobre de la même année[147], les biens confisqués étaient déterminés en fonction de l'appartenance de leurs propriétaires au «peuple» allemand ou hongrois, sur une base exclusivement ethnique et sans considération de nationalité. Il ne s'agissait nullement de réparations de guerre mais, aux termes des décrets eux-mêmes, de la confiscation des biens des «ressortissants allemands et hongrois et des traîtres et ennemis du peuple tchèque et slovaque»[148]. Du reste, la Tchécoslovaquie a communiqué à l'agence interalliée des réparations des informations sur les biens allemands saisis par elles et ces informations n'ont en aucune manière porté sur les confiscations réalisées par les décrets Beneš[149].

20. En d'autres termes, l'Allemagne n'a nullement «endossé» le fait internationalement illicite commis en 1945 par la Tchécoslovaquie au sortir de la guerre. Elle ne l'a pas «reconnu et adopté comme sien» au sens de l'article 11 du projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite annexé à la résolution 56/83 de l'Assemblée générale des Nations Unies. Elle a commis un autre fait illicite, distinct, en incluant les biens liechtensteinois dans le régime des réparations réglementé par la convention sur le règlement de 1952, qui est sans lien aucun avec les comportements de la Tchécoslovaquie derrière lesquels la Partie allemande tente maintenant de s'abriter.

21. Du reste, il est révélateur qu'au cours des procédures qui sont à l'origine de la très contestable position prise par l'Allemagne depuis 1995 et de la présente affaire, les cours et tribunaux allemands ne se sont, en aucune manière, prononcés sur la licéité des décrets Beneš. Bien au contraire, à l'image de la cour d'appel de Cologne, ils ont estimé qu'ils pouvaient se

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[146] ML, annexe 6.

[147] ML, annexe 7.

[148] Décret n° 12 — ML, annexe 6; traduction du Greffe, p. 6 du texte français; voir aussi l'annexe 7, *ibid.*, p. 9

[149] Voir le rapport de l'Agence interalliée des réparations 1949, cité dans le commentaire d'Ignaz Seidl-Hohenveldern, *in Neue Juristische Wochenschrift*, 1953, p. 1390 (note 10) or Helmut Slapnicka, *Die rechtlichen Grundlagen für die Behandlung der Deutschen und der Magyaren in der Tschechoslovakei 1945-1948*, Intereg, Prague, 1999, p. 19.

prononcer *sans* avoir à examiner «la licéité ou la validité de la mesure de liquidation qui a été prise à l'encontre d'avoirs allemands à l'étranger et sur laquelle l'action est fondée»[150]. D'ailleurs, en plaidoirie, lundi dernier, nos amis allemands y ont insisté :

— «des tribunaux allemands ne se sont jamais prononcés sur le statut légal … d'aucun … avoir du Liechtenstein situé en République tchèque ou en République slovaque»[151] a dit l'agent de l'Allemagne;

— «Not a single word is devoted in these decisions to the substantive aspects of the case»[152] a renchéri le professeur Tomuschat.

22. De l'aveu de l'Allemagne, les tribunaux allemands n'ont pas estimé devoir se prononcer sur la validité (ou non) des décrets tchécoslovaques. Vous n'êtes pas davantage appelés à l'apprécier, Madame et Messieurs de la Cour : il vous suffira bien plutôt, au stade de l'examen au fond, de déterminer si, en décidant que les biens confisqués (licitement ou non, là n'est *pas* la question) relevaient du régime des réparations de guerre, l'Allemagne a agi conformément au droit international; si, ce faisant, elle a, ou non, violé la neutralité et la souveraineté du Liechtenstein, si elle s'est, ou non, injustement enrichie.

23. Nous sommes, Monsieur le président, bien loin du cas de figure des affaires de l'*Or monétaire* ou du *Timor oriental* : dans ces deux cas, la Cour a été empêchée de se prononcer parce que, pour ce faire, elle aurait dû, nécessairement, inévitablement, apprécier au préalable, dans l'affaire de 1954, les droits de l'Albanie sur l'or monétaire pris à Rome, dans celle de 1995, la licéité de la présence de l'Indonésie au Timor oriental. Ici, peu importe que les décrets Beneš fussent ou non licites : de toutes façons, la position de l'Allemagne qui assimile les biens en cause à des réparations de guerre (ce que la Tchécoslovaquie n'avait pas fait), porte atteinte aux droits de la Principauté de Liechtenstein — c'est en tout cas ce que celle-ci vous demande de décider au fond — et elle le fait en toute connaissance de cause, en sachant parfaitement qu'au stade du fond

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[150] Décision du 9 juillet 1996, ML, annexe 29, p. A303; traduction du Greffe : p. 33, point 2.*a)*; voir aussi la décision du tribunal régional de Cologne du 10 octobre 1995, ML, annexe 28, p. A264, section 2.*b bb)*; traduction du Greffe, p. 21 du texte français.

[151] CR 2004/24, p. 19, par. 37.

[152] *Ibid.*, p. 37, par. 104.

elle ne pourra pas invoquer l'illicéité des décrets (qu'elle tient pour acquise mais pour d'autres raisons).

24. C'est d'ailleurs pour cela, Monsieur le président, parce que les motifs de la responsabilité de l'Allemagne et de celle, éventuelle, des Etats successeurs de la Tchécoslovaquie sont distincts, que nous ne sommes même pas dans la situation qui prévalait dans l'affaire de *Nauru* dans laquelle la Cour n'a pas été empêchée de se prononcer sur la responsabilité de l'Australie alors même que celle-ci était nécessairement identique à la responsabilité de l'Empire britannique et de la Nouvelle-Zélande, et *pour les mêmes raisons*[153]. Par contraste, la solution que vous serez conduits à donner à la présente affaire, Madame et Messieurs de la Cour, sera sans effet sur la question de la responsabilité éventuelle des Républiques slovaque et tchèque :

— que, dans votre futur arrêt au fond, vous reconnaissiez ou non la responsabilité de l'Allemagne pour avoir inclus les biens liechtensteinois dans le schéma des réparations de guerre, ceci sera sans incidence aucune sur la responsabilité (ou l'irresponsabilité) de ces deux Etats pour la confiscation opérée par les décrets Beneš : que l'Allemagne ait, ou non, raison de considérer que les biens en question relèvent du régime des réparations de guerre, la question de la validité des confiscations opérées par les décrets demeurera entière (alors que, dans l'affaire de *Nauru*, la question de la responsabilité du Royaume-Uni et de la Nouvelle-Zélande aurait, en fait sinon en droit, été tranchée par l'arrêt que vous auriez rendu au fond, les mêmes causes produisant les mêmes effets — les trois Etats intéressés ne s'y sont d'ailleurs pas trompés, qui ont décidé d'indemniser conjointement Nauru pour une partie des préjudices qu'il alléguait);

— à l'inverse, vous pouvez parfaitement vous prononcer sur la responsabilité de l'Allemagne sans avoir à apprécier celle de la Tchécoslovaquie : que les confiscations auxquelles celle-ci a procédées fussent ou non licites, l'Allemagne ne pouvait, de toute manière, les considérer comme un élément du régime des réparations.

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[153] Cf. l'arrêt du 26 juin 1992, *C.I.J. Recueil 1992*, p. 261-262, par. 55.

B. Les droits à réparation de la Tchécoslovaquie ne sont pas davantage «d'objet même du litige»

25. En outre, et ce sera mon second point, la licéité (ou l'illicéité) des confiscations décidées par la Tchécoslovaquie en 1945 est tout aussi indifférente pour répondre à la question de savoir si, comme l'estime le Liechtenstein, l'Allemagne s'est ou non enrichie sans cause. Depuis 1945, ces biens sont, de fait, sous le contrôle de la Tchécoslovaquie; ceci est un fait et un fait qui est demeuré sans incidence sur «la richesse de l'Allemagne» aussi longtemps que celle-ci n'avait pas décidé d'en faire un élément des réparations.

26. Par elle-même, la confiscation des biens liechtensteinois par la Tchécoslovaquie était sans rapport avec les réparations et n'a d'ailleurs jamais été prise en compte à ce titre ni par l'Allemagne jusqu'à la naissance du présent différend, ni par les Alliés, ni par la Tchécoslovaquie elle-même. Ainsi que je l'ai rappelé il y a quelques instants, les décrets Beneš n'ont pas été adoptés dans la perspective des réparations de guerre mais, comme l'indique le titre même du décret n° 12, en vue de procéder à «la répartition accélérée des terres agricoles des ressortissants allemands et hongrois et des traîtres et ennemis du peuple tchèque et slovaque»[154]. C'est la décision de l'Allemagne de considérer que les biens liechtensteinois confisqués en vertu des décrets Beneš entrent dans le cadre des réparations de guerre qui constitue l'enrichissement sans cause dont la Principauté a lieu à se plaindre.

27. Pour le contester, l'Etat défendeur avance un curieux argument : la Cour, écrit l'Allemagne dans ses exceptions préliminaires, «could not decide on any compensation due for unlawful seizure of Liechtenstein property by Czechoslovakia without first determining the legal relationships between Germany and a third sovereign State, namely the Czech Republic»[155]. Cela laisse songeur, Monsieur le président : la thèse de l'Allemagne (la *nouvelle* thèse de l'Allemagne) repose sur l'idée que les biens qui sont l'objet du présent différend relèvent du régime des réparations. Ce n'est pas la République tchèque qui le dit, ce n'est évidemment pas le Liechtenstein qui le dit — c'est l'Allemagne; et c'est cette position *allemande* qui est à l'origine de toute l'affaire comme l'a d'ailleurs reconnu le professeur Frowein avant-hier : «the present dispute» he said, «came into being because the German courts found [in 1995 and the next years

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[154] ML, annexe 6, p. A.9; traduction du Greffe, vol. I, p. 6.

[155] EP, p. 107, par. 174.

— this I add] that they were prevented by the Settlement Convention from looking into th confiscation of the painting»[156] — ceci, je le rappelle sans avoir besoin de se prononcer sur l validité des décrets de 1945.

28. Et pourtant c'est ce même Etat qui vient affirmer devant vous que vous ne pourriez pa vous prononcer parce que, pour ce faire, il faudrait que vous déterminiez que ces réparations son effectivement dues. En réalité, vous n'avez, Madame et Messieurs de la Cour, rien à décider de c genre; il suffit bien plutôt que vous constatiez que l'Allemagne elle-même tient pour acquis qu'ell est tenue à réparations envers les successeurs de la Tchécoslovaquie, ne fût-ce que, précisémen dans les décisions prises par ses tribunaux nationaux entre 1995 et 1998. En incluant les bien liechtensteinois dans ces réparations, elle allège d'autant le fardeau de la dette lui incombant à c titre.

29. J'ajoute que si l'Allemagne faisait erreur; si, contrairement à ce qu'elle dit et à c qu'implique le comportement de ses organes, elle ne devait pas de réparation à la Tchécoslovaqui la position qu'elle a prise en ce qui concerne les biens en question n'en serait pas moin évidemment illicite : elle les aurait alors inclus dans une dette imaginaire, une dette «de chat botté» si bien qu'au lieu de devoir les restituer aux successeurs de la Tchécoslovaquie, elle se les serait, e quelque sorte, appropriés. En tout cas, la position prise par ses organes judiciaires et politique serait entachée d'une grave illicéité puisqu'elle repose sur le fait (inexact) qu'il s'agit d réparations de guerre qu'un Etat neutre aurait pu payer à sa place.

30. Au surplus, comme un très éminent conseil de l'Allemagne (ils le sont tous ...) l'a fa valoir dans l'affaire relative à la *Licéité de l'emploi de la force*, il n'existe pas de parallèle entre le droits et les obligations d'un sujet de droit; un Etat peut toujours renoncer à ses *droits*, mais se obligations s'imposent à lui objectivement. Je cite ce très éminent conseil :

> «It is trivial to note ... that a State has a power of disposition over its rights, but not over its obligations. In the case of a multilateral treaty which generates rights and obligations in the relations between the different parties, transactions being effected between two parties do not entail legal effects for third parties.»[157]

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[156] CR 2004/24, p. 25-26, par. 62.

[157] *(Serbie et Monténégro c. Allemagne)*, 20 avril 2004, CR 2004/11, p. 20, par. 39; voir aussi p. 19, par. 3 (Tomuschat).

Il n'y a aucune raison que ce qui vaut pour les obligations assumées par la Serbie et Monténégro en vertu de la convention sur le génocide ne vaille pas également pour celles qui s'imposent à l'Allemagne en vertu de la convention de 1952, amendée en 1954.

31. En d'autres termes, Monsieur le président, si réellement la Cour estimait utile de déterminer si oui ou non l'Allemagne doit des réparations aux Républiques tchèque et slovaque (ce qui n'est pas nécessaire pour les raisons que j'ai indiquées), elle se prononcerait sur les *obligations* de l'Allemagne — qui, selon la Partie allemande elle-même, doivent et peuvent être déterminées objectivement — mais ne toucherait nullement aux obligations de ces deux pays dont les droits éventuels seraient, au contraire, parfaitement préservés.

32. En outre, ici encore, la question de l'enrichissement sans cause de l'Allemagne — qui est un problème de fond — est tout à fait indépendante de savoir si les confiscations décidées en 1945 par la Tchécoslovaquie étaient ou non licites. Ce n'est pas cette confiscation qui est à l'origine d'un enrichissement de l'Allemagne; c'est la décision de celle-ci — de celle-ci seule — d'inclure les biens en question dans le régime des réparations.

C. La Cour peut et doit se prononcer sur l'affaire, même si des droits des Etats successeurs de la Tchécoslovaquie devaient être «touchés»

33. Monsieur le président, les droits d'aucun Etat absent de la présente instance ne sont l'objet de celle-ci et il ne fait aucun doute que la Cour peut se prononcer sur la requête du Liechtenstein sans porter atteinte aux droits des Etats successeurs de la Tchécoslovaquie et sans avoir à apprécier leur responsabilité éventuelle à l'égard du Liechtenstein. Dans ces conditions, puisqu'il n'existe entre les Parties aucun désaccord quant à l'existence d'une base de compétence de la Cour — en l'espèce l'article 1er de la convention de Strasbourg pour le règlement pacifique des différends —, la haute juridiction peut et doit se prononcer sur le litige que la Principauté lui a soumis.

34. Il en va ainsi quand bien même les intérêts de certains Etats tiers pourraient être «touchés». Ceci résulte très clairement de la jurisprudence de la Cour, et, plus précisément, du précédent de l'*Or monétaire* dont il résulte que vous ne pouvez connaître d'une requête si les droits d'un Etat tiers à l'instance forment l'objet même du litige, mais aussi, à l'inverse, que la Cour n'est pas empêchée de se prononcer si les droits et intérêts d'un tiers peuvent être touchés.

35. Le Liechtenstein a exposé de manière assez détaillée ce second aspect aux paragraphes 5.5 et 5.6 de ses observations. Je me permets, Madame et Messieurs les juges, de vous y renvoyer. Mais il me paraît nécessaire d'ajouter deux remarques.

36. En premier lieu, comme la Principauté l'a également montré dans ces mêmes observations[158], ce principe doit trouver d'autant plus à s'appliquer en la présente espèce que l'article 32, paragraphe 1, de la convention de Strasbourg de 1957 dispose : «La présente convention demeure applicable entre les parties encore qu'un Etat tiers, partie ou non à la convention, ait un intérêt dans le différend.»

37. Cette disposition, adoptée très rapidement après l'arrêt de *l'Or monétaire* (donc en toute connaissance de cause), est un héritage direct de l'article 35 de l'Acte général d'arbitrage de 1928. Elle n'a rien d'obscur : les parties à la convention de 1957 ont voulu éviter le genre d'objections que soulève l'Allemagne. Aucun différend n'est complètement «étanche»; d'une manière ou d'une autre, des Etats tiers, parties ou non à la convention, sont souvent intéressés à la solution d'un litige. Il reste que les parties sont convenues que ceci ne constituerait pas un obstacle à la soumission de tels différends à la Cour internationale de Justice. Et je ne vois pas en quoi ceci constituerait une quelconque «Rechtsbeugung» comme l'avance le professeur Dupuy[159].

38. Bien entendu, ce faisant, les parties à la convention européenne n'ont pas entendu déroger au Statut de la Cour et elles n'eussent pu le faire. Aussi bien ce n'est pas le cas; cette disposition reflète simplement l'aspect de la jurisprudence de l'*Or monétaire* que l'Allemagne veut oublier : la Cour n'est pas empêchée de se prononcer sur un différend à l'égard duquel une tierce partie peut avoir un «intérêt». Au surplus, en prévoyant expressément, à l'article 33 (et pas à l'article 32, comme M. Dupuy le laisse entendre[160], ce qui montre qu'il s'agit de problèmes distincts), en prévoyant donc, *à l'article suivant*, une possibilité d'intervention en faveur des Etats tiers qui estiment que leurs «intérêts légitimes sont en cause», les rédacteurs de la convention se sont montrés parfaitement fidèles aux principes qui gouvernent la compétence de la Cour : la possibilité d'intervention prévue aux articles 62 et 63 du Statut a précisément pour objet de

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[158] EP, p. 77-78, par. 5.7 à 5.10.

[159] CR 2004/24, p. 56, par. 145.

[160] *Ibid.*

permettre à des Etats qui peuvent être intéressés par le règlement d'une affaire portée devant la Cour mais dont les droits ne sont pas l'objet même du différend, de faire valoir leur point de vue.

39. Au demeurant, et ce sera ma seconde et dernière observation, Monsieur le président, il ne faut pas exagérer l'intensité des intérêts que les Républiques slovaque et tchèque pourraient être conduites à faire valoir en la présente espèce.

40. D'une part, je l'ai montré et n'y reviens pas, ni leurs droits, ni leurs obligations, ne sont assurément l'objet même du différend dont le Liechtenstein a saisi la Cour. Et, d'autre part, ces deux Etats ont, finalement, un intérêt très limité à la solution du litige :

— la licéité des décrets Beneš n'est pas en cause;

— les obligations de réparation que l'Allemagne peut avoir à leur égard ne le sont pas non plus puisque seule est concernée la position que celle-ci a prise en ce qui concerne non pas le principe des réparations mais la soumission des biens du Liechtenstein au régime des réparations de guerre résultant de la convention de Paris de 1952 amendée en 1954. Et d'ailleurs, plus précisément, leur soumission *partielle* puisque l'Allemagne ne considère les biens en question comme relevant du mécanisme des réparations que pour autant que cela lui permet de «bénéficier» de l'interdiction faite à ses tribunaux de se prononcer sur les questions de réparation par l'article 3, paragraphe 3, du chapitre 6, de la convention de Paris. Mais l'Allemagne se garde bien de «ressusciter» en faveur du Liechtenstein et des Liechtensteinois spoliés, l'obligation d'indemnisation que posait l'article 5 de cet instrument, abrogé en 1990 au prétexte que toutes les compensations en résultant avaient été versées[161]. Même si ceci n'est pas ponctué par une sonnerie de téléphone intempestive, je crains d'avoir trouvé la «belle au bois dormant» — mais les baisers du prince ne la fléchissent point : cette belle endormie, c'est l'obligation de réparer. Ce sera donc à vous, Madame et Messieurs les juges, de lui redonner vie sous la forme appropriée dans l'arrêt que vous serez conduits à rendre sur le fond.

41. En conclusion, Monsieur le président, c'est un litige très authentiquement bilatéral qui a été soumis à la Cour :

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[161] Voir l'échange de notes du 28 septembre 1990, *RTNU*, n°°28492.

- ce différend concerne la décision *de l'Allemagne*, et d'elle seule, d'inclure «certains biens» dans le système des réparations sans, pour autant, envisager d'indemniser les ressortissants du Liechtenstein concernés;
- du même coup, se posent de graves problèmes de principe concernant la souveraineté du Liechtenstein et son statut de neutralité durant la guerre, que la position adoptée *par l'Allemagne*, et elle seule, depuis 1995, remet en cause;
- pour trancher ces questions, il n'est nullement nécessaire que vous vous prononciez, Madame et Messieurs les juges, sur la validité des décrets tchécoslovaques de 1945, dont la licéité est, ici, indifférente; et,
- dès lors, les droits des Etats successeurs de la Tchécoslovaquie ne sont en aucune manière «l'objet même» du différend que le Liechtenstein vous a soumis.

42. Monsieur le président, mon intervention conclut le premier tour de plaidoiries de la Principauté du Liechtenstein. Il ne me reste donc, Madame et Messieurs de la Cour, qu'à vous remercier très vivement, au nom de toute notre équipe, de la bienveillante attention que vous avez bien voulu leur prêter.

The PRESIDENT: Thank you, Professor Pellet. Your statement indeed brings to an end the first round of oral argument by the Principality of Liechtenstein. I wish to thank each of the Parties for the statements presented in the course of this first round of oral argument.

The Court will meet again tomorrow from 10 to 11.30 a.m. to hear the second round of oral argument of the Federal Republic of Germany. At the end of tomorrow's sitting, Germany will present its final submissions. I recall that Liechtenstein will then take the floor on Friday 18 June from 10 to 11.30 a.m., for its second round of oral argument, and will present its final submissions at the end of this sitting.

Therefore, each Party will have a speaking time of one-and-a-half hours. I should nevertheless like to remind both Parties that, pursuant to Article 60, paragraph 1, of the Rules of Court, the oral presentations must be as succinct as possible. The purpose of the second round of oral argument, I would add, is to enable each of the parties to reply to the arguments advanced orally by the other party. The second round must not therefore constitute a repetition of past

statements. It therefore goes without saying that the parties are not obliged to avail themselves of the entire time allowed to them.

Thank you. The Court is adjourned.

The Court rose at 1 p.m.

CR 2004/26

YEAR 2004

Public sitting

held on Thursday 17 June 2004, at 10 a.m., at the Peace Palace,

President Shi presiding,

***in the case concerning* Certain Property (Liechtenstein *v.* Germany)**

ANNÉE 2004

Audience publique

tenue le jeudi 17 juin 2004, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***en l'affaire relative à* Certains biens (Liechtenstein c. Allemagne)**

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Tomka
	Judges *ad hoc*	Fleischhauer
		Sir Franklin Berman
	Registrar	Couvreur

The Government of the Federal Republic of Germany is represented by:

Mr. Thomas Läufer, Director General for Legal Affairs and Legal Adviser, Federal Foreign Off

H.E. Mr. Edmund Duckwitz, Ambassador of the Federal Republic of Germany to the Kingdo
the Netherlands,

as Agents;

Mr. Jochen Frowein, Director emeritus of the Max-Planck-Institute for Comparative Public
and International Law Heidelberg, Professor of Public International Law, Universit
Heidelberg,

Mr. Christian Tomuschat, Professor of Public International Law, Humboldt-University of Berli

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of
(Panthéon-Assas) and the European University Institute of Florence,

as Counsel;

Mr. Daniel Erasmus Khan, Privatdozent, Visiting Professor at the University Bayreuth,

Mr. Andreas Paulus, University of Munich,

Ms Karin Oellers-Frahm, Max-Planck-Institute for Comparative Public Law and International
Heidelberg,

Ms Susanne Wasum-Rainer, Head of the Public International Law Division, Federal For
Office,

Mr. Reinhard Hassenpflug, Federal Foreign Office,

Mr. Götz Reimann, Embassy of the Federal Republic of Germany,

as Advisers;

Ms Fiona Sneddon,

as Assistant.

The Government of the Principality of Liechtenstein is represented by:

H.E. Mr. Alexander Goepfert, Freshfields Bruckhaus Deringer, Düsseldorf, Special Commissi
of the Principality of Liechtenstein,

as Agent;

H.E. Mr. Roland Marxer, Ambassador, Director of the Office for Foreign Affairs of the Princip
of Liechtenstein

as Advocate;

Mr. Dieter Blumenwitz, Professor of Public International Law, University of Würzburg and Munich,

Mr. Thomas Bruha, Professor of Public Law, University of Hamburg,

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Gerhard Hafner, Professor of Public International Law, University of Vienna, Associate Member of the Institute of International Law,

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, member and former Chairman of the International Law Commission,

as Counsel and Advocates;

Mr. Malcolm Forster, Professor of International Law, University College, London, Freshfields Bruckhaus Deringer, London,

Ms Juliane Hilf, member of the Chamber of Lawyers of Germany, Freshfields Bruckhaus Deringer, Cologne,

Ms Lucy Reed, member of the State Bar of New York, Freshfields Bruckhaus Deringer, New York,

as Advocates;

Mr. Daniel Müller, Temporary Lecturer and Research Assistant at the University of Paris X-Nanterre,

Mr. Stephan Wittich, Assistant Professor at the University of Vienna,

as Advisers;

Ms Nadine Heider, Freshfields Bruckhaus Deringer, Cologne,

Ms Gabriele Klein, Freshfields Bruckhaus Deringer, Düsseldorf,

as Assistants;

Mr. Thomas Dillmann, ECC Kohtes Klewes,

Mr. Thomas Pütz, ECC Kohtes Klewes,

as Information Officers.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the second round of oral argument of the Federal Republic of Germany. Thus, I shall now give the floor to Mr. Läufer.

Mr. LÄUFER:

A. Introduction

1. Mr. President, distinguished Members of the Court, Germany was eager to hear Liechtenstein's arguments in its pleadings yesterday. However, our expectations were not met. Liechtenstein neither clarifies the facts nor the international legal basis on which it rests its claims. Let me make crystal clear, at the very outset of today's presentation, that what Germany seeks from the Court at this stage of the proceedings is nothing but a decision on its six Preliminary Objections, all of which are firmly established in the jurisprudence of this Court. To do so Germany submits that there is no necessity whatsoever for the Court to enter into the merits of this case, as Liechtenstein wants the Court to believe. However, for the Court to consider Germany's Preliminary Objections it must be able to fully appreciate the true nature of this case.

2. The subject-matter of this case is the Czechoslovak confiscations in 1945 and not some reparations scheme. Contrary to the honourable Agent of Liechtenstein, *today*, more than 60 years after the end of the Second World War, reparation claims against Germany have no legal basis whatsoever. The question of reparations is obsolete. By applying the Settlement Convention, Germany could not obtain any advantage, neither economic nor otherwise.

3. Now, Liechtenstein is trying to lead the Court down the garden path by claiming that Germany, in the 1990s, somehow affected Liechtenstein's neutrality and sovereignty in order to oblige the Court to needlessly decide on the merits of a non-existing case.

4. Liechtenstein still does not present a single coherent version of its claims. At times, the dispute seems to centre on the interpretation of Chapter VI, Article 3, of the Settlement Convention. At other times, Liechtenstein claims that Germany violated some unspecified rules of international law by "changing its position" with respect to the legal situation of Liechtenstein property in the former Czechoslovakia. More than 30 pages of the Memorial were devoted to this

very issue. What then happened to this core allegation which constitutes — or should I say, constituted — the central pillar on which Liechtenstein bases the Court's jurisdiction in the present case? Indeed, such a change of position on the part of Germany simply did not occur. On the contrary, Germany's position with respect to the questions at stake has always been coherent, consistent and unambiguous. At no point in time has Germany recognized as lawful any confiscations on the part of Czechoslovakia. At no point in time has it changed its attitude with regard to the treatment of foreign assets. What Liechtenstein now tries to make the Court believe is that, in 1995 and thereafter, decisions of German courts constituted the *fait générateur* of the alleged dispute. Indeed, this is a remarkable change of position on the part of Liechtenstein. As counsel for Germany will demonstrate, German courts did not "generate" anything, but simply applied the Settlement Convention of 1955.

5. Lastly, there are also occasions when Liechtenstein claims that Germany treated Liechtenstein assets as "German external assets" by including them in an alleged "reparation régime". In 1995, there was absolutely no reparation scheme in which Liechtenstein assets could have been included. Contrary to what Liechtenstein's Agent wants the Court to believe, Germany never "treated" Liechtenstein assets in any way whatsoever. Rather, what German courts did was to declare that they lacked jurisdiction to consider the claim brought by the Prince of Liechtenstein. Pursuant to Chapter VI, Article 3, of the Settlement Convention, "[n]o claim or action shall be admissible" "with regard to German external assets or property, seized for the purpose of reparation . . . *or* as a result of the state of war". In fact, it was Czechoslovakia, not Germany, which regarded these assets as "German assets" when it confiscated them in 1945. In applying Article 3 of the Settlement Convention, German courts rely on the assessment of the expropriating State. By virtue of Article 3 no property situated in a foreign country is confiscated. What Article 3 does is to prevent *German* courts from exercising jurisdiction over assets confiscated by a *foreign* country.

6. It was Czechoslovakia, by virtue of Beneš Decree No. 12, that confiscated, *inter alia*, Liechtenstein property without compensation. According to Czechoslovakia, Liechtenstein citizens fell within the scope of "all persons belonging to the German and Hungarian people, regardless of

their nationality". Thus it was Czechoslovakia, not Germany that treated Liechtenstein property as German.

7. As clearly indicated by its title, the Settlement Convention does refer to "Matters arising out of the War and the Occupation". It is thus not limited to expropriations for the purpose of reparations, as counsel for Liechtenstein suggests. Rather the Settlement Convention excluded the jurisdiction of the German courts with regard to confiscations "as a result of the state of war" by Allied Powers, including Czechoslovakia. If Liechtenstein's views were correct, it should also have addressed its complaints towards the three Western Allies, namely France, the United Kingdom and the United States of America, who made the restoration of German sovereignty conditional on the conclusion of the Settlement Convention. As the European Court of Human Rights has pointed out, "the Federal Republic of Germany was not in a position to argue against the intention of the Three Powers to exclude a review of confiscation measures"[1].

8. As to our first Preliminary Objection, the distinguished counsel for Liechtenstein, Professor Crawford, claimed that Germany acknowledged the existence of a dispute by participating in diplomatic consultations at the request of Liechtenstein in 1998 and 1999. Mr. President, an amicable discussion of divergent legal opinions should not be equated with the existence of a dispute in the sense of this Court's Statute before it reaches a certain threshold.

9. Counsel for Germany will now present our response to Wednesday's pleadings. I would now ask the Court to give the floor to Professor Frowein who will answer the arguments presented by Professors Crawford and Blumenwitz. Afterwards, Professor Tomuschat will comment on the arguments of Professors Bruha and Hafner. Before I present the final submissions of Germany, Professor Dupuy will respond to Professor Pellet.

The PRESIDENT: Thank you, Mr. Läufer. I now give the floor to Professor Frowein.

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[1] *Prince Hans-Adam II of Liechtenstein* v. *Germany*, European Court of Human Rights, Application No. 42527/98, Judgment, 12 July 2001, para. 56, POG, Ann. 1.

Mr. FROWEIN:

B. Lack of jurisdiction *ratione temporis*

1. Mr. President, honourable judges of the Court, after yesterday's clarification concerning the position of Liechtenstein it seems even more difficult for Germany to answer Liechtenstein's case in a proper manner. While Liechtenstein had emphasized the importance of a German change of position as main argument for overcoming the hurdle of the temporal limitation of your jurisdiction it now seems that Liechtenstein really wants to build a completely new case arising from 1995 onwards.

2. It seems necessary, therefore, to deconstruct the rather complex picture which has been painted before you to show that the Court is really faced with a rather simple development from 1945 to 1995 and onwards.

3. In 1945, after the liberation of Czechoslovakia from German occupation, the Beneš Decrees were adopted by which property of Germans in Czechoslovakia was confiscated. It was a decision by Czechoslovakia to extend that expropriation to persons considered under the Czechoslovak legislation to be persons belonging to the "German people". Germany had of course nothing to do with that decision and bears no responsibility for it.

4. In 1955 the Federal Republic of Germany regained the position of a sovereign State. At that time the three Allied Powers, France, the United Kingdom and the United States insisted that Germany accept the obligation not to raise any objections against a specific class of Allied measures.

5. Because of the impression created by Liechtenstein it is of great importance now to analyse what class of measures fall within the specific provisions of the Settlement Convention. Liechtenstein argues that Germany included former Liechtenstein assets, which, by the way, have been under the territorial jurisdiction of Czechoslovakia and the successor States since 1945, into a "reparation régime" in 1995 and onwards.

6. Now, let us look at what the Settlement Convention tells us. It is correct that Chapter VI of the Settlement Convention carries the headline — and I use the three languages — "Reparationen, Reparations, Réparations". However, it is completely mistaken to believe that this

provision, which you will have looked at before, is limited in its application to "reparations" in any formal sense. I have to read to you the wording of paragraph 1 of Article 3 of Chapter VI of the Settlement Convention:

> "1. The Federal Republic shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany."

7. This wording clearly shows that it is not a specific label of "reparation" which is being protected by that provision only, but all measures against German external assets or other property as a result of the state of war. It was, understandably, the intention of the three Allied Powers to make sure that Germany could not in any manner whatsoever interfere with Allied decisions concerning German property — and who could doubt that the Beneš Decrees fall under Allied legislation concerning property as a result of the state of war. By the way, to speak of the Beneš Decrees as measures of land reform, as we heard yesterday, is, to say the least, bordering on the ridiculous.

8. It is Liechtenstein's argument that Germany included Liechtenstein assets in a "reparation régime" in 1995. Nothing could be farther from the truth. Germany had to accept in 1955 the obligation not to interfere with Allied decisions and leave it to the respective Allied authorities to determine what they considered to be "German assets" in this sense.

9. You will find in our earlier submissions the detailed description of the earlier German case law according to which the qualification of the assets must be left to the Allied decisions. Liechtenstein of course was fully aware of that treaty régime and it must be assumed that Liechtenstein was aware of the lack of German jurisdiction as to the review of the Beneš Decrees affecting, *inter alia*, — unfortunately at that time — Liechtenstein property.

But let me add one consideration. Could one really envisage the proper protection of Allied measures intended by all the three Allied Powers with the Settlement Convention without adding that the question whether or not assets are German or other assets must be left to the confiscating power? Because otherwise Germany would be able to interfere with exactly that system.

10. What happened in 1995 and later was only the application of this treaty system established in 1955 and applicable in particular to confiscations in the immediate post-war period as a consequence of the Second World War by the Allied Powers.

The limitation of the jurisdiction *ratione temporis*

11. It should be underlined that there now seems to be complete agreement between the Parties that the crucial date is not the one when the dispute arose but the date or dates of facts and situations to which the dispute *relates*.

12. According to Liechtenstein it is only in 1995 that all the elements existed to constitute the dispute relating to facts and situations up to 1995. However, this view by Liechtenstein must be checked as to its conformity with the case law of your Court and of the Permanent Court.

13. It is crystal clear, I submit, from the case law in the three cases quoted by both sides that the really important issue is, with regard to which facts a dispute arises, where a limitation of the nature applicable here exists. As the Permanent Court has stated, the question of whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case. In answering this question it is, as the Court has underlined, necessary always to bear in mind the will of the State which only accepted compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance[2].

14. Let me summarize the outcome of the three cases where your Court and its predecessor had to deal with the issue concerned here. In the *Phosphates in Morocco* case the Court found that it had no jurisdiction because what the Italian Government denounced as unlawful was in fact a legal position resulting from French legislation prior to the entry into force of the French declaration on jurisdiction. In the *Electricity Company of Sofia* case the Court rejected the objection because the parties had been in agreement concerning the binding character of the awards which were to be seen as the source of the rights while the source of the dispute were specific acts alleged to be in violation of the awards but dated after the acceptance of the jurisdiction. In the *Passage over Indian Territory* case your Court established its jurisdiction *ratione temporis* because

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[2] *Phosphates in Morocco, Preliminary Objections, Judgment, P.C.I.J., Series A/B No. 74*, p. 24.

it was undisputed that passage had existed for a long time and it was then interrupted at a time when you had jurisdiction, and the dispute related to these facts. By the way, unlike what my eminent and learned colleague and friend Professor Crawford stated, I have not at all referred to a "common position" as to the right of passage.

15. As the Permanent Court has so aptly stated limitations concerning jurisdiction *ratione temporis* have to be applied bearing in mind the intention of States not to be confronted with cases dating from a period when the State was not in a position to foresee the legal proceedings. We shall now apply the standards again clarified to the Liechtenstein Application. Let me take the criticisms expressed by Professor Crawford concerning our objection in the order he advanced them.

Application of the criteria in the present case

16. Professor Crawford underlines correctly that the dispute was triggered by the German courts in the period after 1995. He adds that this was a focal point. He admits that the background situation and the legal rights and obligations of the Parties had an older source but he suggested that this is irrelevant, as it was irrelevant in the *Passage* case.

17. Germany completely disagrees. It is of course true that the dispute was triggered after 1995 — if there is a dispute. But the dispute only relates to facts and legal situations before 1980. Let me clarify that again. By the decisions concerning the *Pieter van Laer Painting* case, German courts applied a provision which had been continuously in force since 5 May 1955. It had been introduced by the Settlement Convention concluded by France, the United Kingdom and the United States with the Federal Republic of Germany. German case law had confirmed throughout that this Convention prevented German courts from looking into Allied decisions confiscating assets as "German assets", and the Beneš Decrees were such measures.

18. The reason for the insistence of the three Allied Powers that the Federal Republic of Germany accept such an obligation is, I submit, all too clear. They wanted to avoid any discussion or review of those decisions by German authorities or courts. Only Allied authorities or courts should be competent to review them. Liechtenstein, like all other European States, was fully aware of that situation. Liechtenstein never approached Germany concerning that matter with the

intention of questioning that legal situation before 1999. At that time it made the proposal to commence negotiations with the objective to reach just compensation for the properties confiscated by Czechoslovakia in 1945. Germany of course refused any compensation.

19. Professor Crawford insisted that the German argument according to which the Court would have to examine events before 1980 is not relevant. He refers to the *Right of Passage* case, underlining that the Court could in that case have regard to treaties and other instruments dating back to the eighteenth century. But he wisely quotes *Phosphates in Morocco* only in a very limited and selective way. In this case, as we all know, the Permanent Court held that the legal situation, about which the Italian Government complained, had existed long before the jurisdictional clause applied *ratione temporis*. Therefore, the Court did not have jurisdiction.

20. The comparison between the two cases and the one before us is really quite easy, I submit. In the *Passage* case, the dispute related to the stopping of the passage by India and all legal issues concerning a right to passage could be taken into account by the Court. In the *Phosphates* case, the Court could not look into the matter because the legal situation had been exactly the same since long before the jurisdictional clause applied and no separable facts or legal situations were at issue. Germany submits that we are here clearly in the same category as the *Phosphates in Morocco* case. What was applied by German courts in 1995 and later was a legal régime applicable for Germany since 1955, established by the three Allied Powers, France, United Kingdom and United States together with Germany.

21. Liechtenstein wants to persuade us that the 1995 case does not relate to facts and legal situations before 1980. However, it is really unable to show us in which way your Court could disregard the Beneš Decrees, the confiscations based on these Decrees, the old reparation régime, the conclusion of the Settlement Convention and the lack of any Liechtenstein activity before 1980. This shows beyond doubt that this case really relates to facts and legal situations before 1980. To avoid any misunderstanding let me repeat again: we do not dispute that Liechtenstein addressed a claim of compensation to Germany in 1999. But the facts and legal situations on which a possible claim on compensation could be judged happened in 1945 and 1955.

22. Liechtenstein takes issue with the German argument according to which it is impossible to make a meaningful distinction between the source of the rights alleged by Liechtenstein and the

source of the alleged dispute. Professor Crawford rightly insists that the Court had no difficulty in drawing that distinction in the *Right of Passage* case. But the difference between the situations is indeed striking. In the *Passage* case, the source of the rights was possibly — and in fact — old legal instruments and general practice. The source of the dispute was the factual stopping of the passage.

23. In the present case the source of the rights can of course be seen in the legal position of Liechtenstein in 1945 and afterwards. But only in the most artificial way could one accept that when Germany applied legal instruments, which had been in force for many decades, there was a different source of the dispute. The *real* source of the dispute is, and remains, the confiscation of the then Liechtenstein property in 1945 by Czechoslovakia and the legal consequences prevailing since then. Professor Crawford is right when he says that the Court looks at the focus of the dispute as a whole, not its various ingredients considered in isolation. This clearly proves that the source of the dispute cannot be the confirmation of a legal bar existing for German courts and having existed since 1955 when, by mere accident, a painting belonging to the Prince of Liechtenstein in 1945 comes into Germany in 1991. Without this story, there would be no dispute, and I will come back to that issue again.

24. Professor Crawford downgrades the importance of the change of position argument. He may have good reasons to do that given the possibility to abuse it for overcoming the limits of the temporal jurisdiction of your Court. He again stresses that it should be a debate for the merits. But he fails to address the point whether an alleged change of position, denied by the Respondent, can really be a tool to overcome the crucial date. Of course, I submit, it cannot.

25. The problem with the three hypothetical cases envisaged by Professor Crawford at the end of his pleadings is this: he does not tell us how he would uphold the importance of the limitation *ratione temporis* in all the three hypothetical situations. As so clearly described by the Permanent Court in the *Electricity Company of Sofia* case, it is really the centre point of the argument of the applicant which is decisive for the establishment of the crucial date. If the centre of the argument concerns the legal situation created in 1945 and in 1955 it is impossible to overcome the limitation *ratione temporis* with the crucial date of 1980 by introducing different hypothetical elements.

Conclusion

26. Let me conclude, Mr. President, honourable judges of the International Court of Justice, Germany continues to advance the argument that analysed as to the real source, the dispute falls under the limitation of the temporal jurisdiction in the sense that all the important elements date back before 1980. What Liechtenstein tries to deduce wrongly from the events triggered by the strange *Pieter van Laer Painting* case is a complete construction of new facts and legal situations which are really completely unreal. Germany has not included any Liechtenstein assets in a reparation régime in 1995. Germany has applied legal rules stipulated in a treaty concerning Allied confiscations in and after 1945, the treaty being concluded and having entered into force in 1955. The properties concerned, continuously described as Liechtenstein assets, are properties which, according to the laws applied by the territorial sovereign, are not Liechtenstein assets but properties of the respective Czech or Slovak owners. They have been in that situation since 1945.

27. Germany respectfully submits that Liechtenstein's Application must be rejected for lack of jurisdiction *ratione temporis*. With your permission, Mr. President, I shall go on for a very few minutes concerning our next argument.

C. La compétence exclusive de l'Allemagne

1. Monsieur le président, Madame et Messieurs les juges de la Cour, permettez-moi, avec quelques mots seulement de répondre à l'intervention de mon collègue professeur Blumenwitz en ce qui concerne l'article 27 *b)* de la convention européenne pour le règlement pacifique des différends de 1957.

2. Le professeur Blumenwitz cite, à juste titre, l'argumentation bien connue de la Cour permanente sur la compétence exclusive des Etats. Il ajoute, et je suis d'accord avec lui, que c'est seulement la conclusion provisoire qui est déterminante pour l'application à ce stade.

3. Il semble, néanmoins, que le professeur Blumenwitz n'a pas très bien saisi l'argument de l'Allemagne dans ce contexte. L'argument ne concerne pas du tout l'applicabilité de la convention européenne des droits de l'homme ou la convention entre l'Allemagne et les trois Alliés de 1955. L'argument concerne la position du Liechtenstein envers les décisions des tribunaux allemands qui sont les seuls actes d'Etat en cause.

4. Le critère important d'après une analyse juridique propre est la question de savoir si le Liechtenstein a présenté un argument d'après lequel les décisions des tribunaux allemands de retourner le tableau van Laer au musée tchèque à Brno pourrait violer un droit du Liechtenstein garanti par le droit international public.

5. Le Liechtenstein, pour des raisons évidentes, a refusé de faire une telle proposition. Le Liechtenstein et ses conseils savent très bien que le droit international public n'oblige pas les Etats à traiter les expropriations illicites des tiers Etats comme des nullités. Il y a une jurisprudence abondante de beaucoup de pays de reconnaître les conséquences des expropriations illicites. J'ai cité la doctrine, y inclus le professeur Pellet.

6. Monsieur Blumenwitz, dans le paragraphe 8, parle de «certain property claimed by Liechtenstein under international law» : mais il n'ajoute pas que le Liechtenstein a avancé l'argument que les tribunaux allemands sont obligés, d'après le droit international public, de traiter l'expropriation du tableau comme une nullité. Or, puisque cet argument n'est pas soulevé, il est clair que les décisions des tribunaux, en ce qui concerne l'effet des expropriations, ne sont pas, même d'après la position du Liechtenstein, déterminées par le droit international public.

7. Regardant les châteaux et forêts la situation est vraiment beaucoup plus nette encore. Le Liechtenstein refuse de nous dire sur quelle base l'Allemagne pourrait être obligée de traiter ces avoirs, les forêts et châteaux, comme des avoirs liechtensteinois. Ils se trouvent depuis 1945 sur le territoire d'un Etat souverain outre que le Liechtenstein. Cet Etat les regarde comme des avoirs appartenant à ses citoyens.

8. Si le professeur Blumenwitz mentionne qu'il n'y a pas de citations pour la proposition que le droit international ne regarde que les résultats d'une procédure judiciaire interne c'est quand même assez surprenant. Il est clair dans notre cas que seule une règle du droit international créant pour l'Allemagne l'obligation de retourner le tableau au prince de Liechtenstein pourrait ouvrir le plan du droit international. L'Allemagne n'a pas entendu le Liechtenstein plaider que cette règle existe. Comme déjà dit, c'est pour bonne raison car chaque internationaliste est d'accord pour dire que cette règle n'existe pas.

9. Monsieur le président, c'est pour cette raison que l'Allemagne reste convaincue que l'article 27 *b)* exclut le cas de votre compétence. Je vous remercie Monsieur le président pour votre attention.

The PRESIDENT: Thank you, Professor Frowein. I now give the floor to Professor Tomuschat.

Mr. TOMUSCHAT:

D. Lack of substantiation of Liechtenstein's claims

1. Mr. President, distinguished Members of the Court, yesterday, when Liechtenstein presented its observations in reply to Germany's Preliminary Objections, I carefully listened to what Professor Bruha and the other members of the Liechtenstein delegation had to say about the factual grounds and legal arguments which might be susceptible of supporting the claims now pending before this Court. Unfortunately, Mr. President, I must admit I am still none the wiser as to the legal foundations of these claims. I was reminded of a beautiful film I saw many years ago, the title of which was "Blow Up". At the heart of that film was a photo taken in a park where all the bushes and trees were lush and green. But something seemed to have happened in the remotest corner of the park, something frightening. Attempts were made to clarify the mystery by enlarging the photo, again and again. But the mystery remained. There was a shadowy something, yes, but its precise contours, its reality, its meaning could not be grasped.

2. Well, we are here in a similar position. Professor Bruha yesterday spent 20 minutes trying to explain to everyone present in the courtroom that the case at hand had a clear profile. However, apart from drawing attention to the fact that according to Article 40, paragraph 1, of the Statute and Article 38, paragraph 2, of the Rules of Court only a "succinct" statement of the facts and legal grounds is required, a proposition with which Germany fully agrees, but he has not reached his objective. Nor has any other member of the Liechtenstein team been able to enlighten the listeners on the subject-matter of the claim. In the relevant section of his pleading (A), Professor Bruha confined himself to asserting that Liechtenstein had

> "clearly indicated the underlying grounds for its claims against Germany, by describing the series of judicial decisions, subsequent conduct, and diplomatic

> exchanges, as well as the underlying factual and historical background. Similarly, it has set out the main legal grounds on which its claim is based."

3. Well, this is rather poor in substance, it provides no clear answer to the question which must be answered. Liechtenstein charges Germany with having committed an internationally wrongful act. This is an allegation which Germany cannot take lightly. A global reference to a mass of unspecified materials does not suffice to meet the applicable procedural requirements. If a State brings an allegation against another State of not complying with its international duties, it must be precise and unambiguous. The relevant facts must be identified in an unequivocal manner.

4. Well, continuing his journey through the territory assigned to him, Professor Bruha then turns to the formula already found in the written pleadings. He refers to "Germany's treatment of Liechtenstein property as German external assets under the Settlement Convention . . ., which is the cornerstone of the present dispute". He thereby takes up the words of Ambassador Marxer in the sense that the dispute concerns "l'application faite récemment par l'Allemagne, du régime des réparations de guerre aux biens appartenant au Liechtenstein et à ses nationaux". A few minutes later, the Agent for Liechtenstein declared:

> "It is the heart of Liechtenstein's case that Germany bears international responsibility for infringing Liechtenstein's neutrality and sovereignty by allowing Liechtenstein assets to be treated, for the first time in 1995, as German external assets for purposes of the Settlement Convention. This is what this case is about."

Professor Crawford (para. 15.) spoke of

> "Germany's increasingly emphatic acceptance of the proposition that property of Liechtenstein citizens could rightfully be treated as 'German external assets' for the purposes of the Settlement Convention, with adverse consequences both for the individual concerned and for Liechtenstein itself as a neutral State."

And I can hardly count the number of times Professor Pellet mentioned the fact that Germany allegedly decided "d'inclure les biens Liechtensteinois dans le régime des réparations".

5. We can therefore safely assume that this was and is a concerted strategy. Deliberately, Liechtenstein repeated the formula again and again, but without adding any explanatory statement. In fact, what does it mean, "inclusion in the reparations scheme"?

6. We do not assume that this was a calculated attempt to create confusion in the minds of the persons concerned with the instant case. In fact, the formula would seem to suggest that Germany derived economic advantages from the alleged decision or measure. In fact the Agent for

Liechtenstein contends (para. 15), out of the blue and without providing any justification for his statement, that:

> "By including Liechtenstein property within the German reparations régime, Germany has obtained a very considerable economic advantage vis-à-vis Liechtenstein . . . Germany still owes substantial sums to the Czech and Slovak Republics as war reparations, as it does to other Allied and associated Powers of World War II."

But this was the only time yesterday when the observer found a hint of what might be behind the almost Delphic refrain "inclusion in the reparations régime".

7. What is the real legal meaning of the series of judgments handed down by German courts in the *Pieter van Laer* case? Just this and no more than this: to adjudicate disputes about property confiscated in the former Czechoslovakia in 1945-1946 does not fall within the jurisdiction of German courts. There has been no interference whatsoever by the German judiciary with all of the real estate, formerly belonging to Liechtenstein citizens, which is safely located in what are today the Czech and the Slovak Republics. Therefore, what Professor Crawford stated, namely that the line of decisions in the *Pieter van Laer* case "became a general position" of the German Government (para. 15), could hardly be further from the truth. There have simply been no subsequent cases where determinations of a similar nature were to be made.

8. The explanation for this state of affairs is simple. The real estate concerned lies outside the jurisdiction of Germany, of its legislative, its executive and its judicial branches of government. In the 1990s, Germany did not and could not take any decision with regard to assets located in a foreign country, and it never wished to do so.

9. But I want to return to the formula "inclusion in the reparations régime". As already said, it explains nothing, it is entirely hollow, and no one from the Liechtenstein team has made a serious attempt to explain what it could possibly connote. We therefore have to repeat: in accordance with Article 3, paragraph 3, of Chapter VI of the Settlement Convention, the German courts seised with the *Pieter van Laer Painting* case limited themselves to stating that they lacked jurisdiction to adjudicate the matter. Germany abstained from granting judicial protection, and this "failure" was not a violation of its general duty to provide a remedy to anyone seeking to vindicate his civil rights in a suit at law, but was perfectly lawful, as confirmed by the European Court of Human Rights. Thus, the real problem was one of alleged passivity and not one of active interference. Once again:

to this very day Germany does not even know with sufficient precision what properties are in issue, and this has not really been contested by Liechtenstein. One is totally at a loss to understand how a number of court decisions in an individual case, where Germany was obliged not to exercise its judicial powers, can possibly be portrayed as a violation of Liechtenstein's sovereignty and neutrality. Had the courts claimed for themselves the power to make determinations on former Liechtenstein assets, had they pronounced themselves on their current legal status, legal consequences could have derived from such decisions. But the German courts did neither of these things. They refused to adjudicate the claim brought by Prince Hans-Adam II in the *Painting* case, and they have never touched upon the other assets which Liechtenstein contends to have lost at the hands of the Czechoslovak authorities.

10. Essentially, what was codified in Article 3, paragraph 3, of Chapter VI of the Settlement Convention is a special instance of a political question doctrine. The Allied Powers were of the view that all of the measures taken by them in the aftermath of the Second World War against German external assets or other property should be removed from the scope of jurisdiction of German courts and tribunals. It has already been pointed out by the Agent for Germany that the relevant provision is not at all confined to measures for the purpose of reparation or restitution, but applies furthermore to measures taken "as a result of the state of war". Germany was deliberately placed under a prohibition to judicially review the measures taken not only by the three Allied Powers, but also by other Allied countries with regard to German property. It is this command which the German courts complied with in the *Pieter van Laer* case.

11. How can a country be charged with committing an internationally wrongful act if it declines to exercise its judicial powers? Could one ever imagine the United States of America being made accountable for a ruling of its courts denying to entertain a judicial case because of its political implications? To be sure, if tomorrow another painting confiscated in 1945-1946 at the hands of the Czechoslovak authorities were found in Germany and were claimed by the former owner, the same legal position would obtain. But it remains a complete mystery what repercussions the *Pieter van Laer* case might have on the former Liechtenstein assets that are located in the Czech Republic, or in Slovakia. There is no such legal effect. Germany has never had any ambition to exercise sovereign powers over those properties. It has not approved of the

Czechoslovak confiscations, nor has it enriched itself by relying on those properties for any "reparations régime".

12. The term "reparations régime" is a catchword that may ring well in many jurists' ears, but it vainly purports to convert fiction into hard fact. Discussions were held on German reparations in the aftermath of the Second World War and, indeed, Germany did pay reparations. Since the reunification of Germany in 1990 by virtue of the Treaty on the Final Settlement with regard to Germany, the issue of reparations is moot. Germany is not aware of any advantages it may have derived from the confiscations carried out by the Czechoslovak authorities.

13. To sum up, the formula "inclusion of Liechtenstein assets in the reparations régime" is an entirely empty construct. What the German courts did in an individual case was to follow the commitments it had been enjoined to assume under a treaty the driving forces behind which were France, the United Kingdom and the United States. The commitment enshrined in Article 3, paragraph 3, of Chapter VI of the Settlement Convention is certainly not for the benefit of Germany, but rather for the benefit of the victorious Allied Powers, including the former Czechoslovakia.

14. How can pure passivity, manifested in an individual court case, amount to a violation of Liechtenstein's sovereignty and neutrality? This is and remains unexplained. Germany observes *en passant* that the reference to Liechtenstein's neutrality demonstrates again that the case had its origin in the period immediately following the Second World War. Why would anyone in the 1990s speak of Liechtenstein as a "neutral" State? How could Germany, 50 years after the Second World War, possibly have violated Liechtenstein's rights as a "neutral" State?

15. The more one tries to find out where the claim brought by Liechtenstein might have its legal foundations, the thicker the fog grows. Inclusion in the reparations régime is a formula which does not even provide a prima facie answer to the relevant questions :

— First, what is the internationally wrongful act that Germany has allegedly committed?

— Second, what legal principles or rules has Germany allegedly violated?

To be sure, a complete answer to these questions pertains to the merits of the case. But an Applicant is under an obligation to explain, by putting forward the relevant factual data and a minimal legal argument, what it believes to be the legal position. A claim which is brought before this Court must at least have some faint plausibility. This is not the case here.

16. The flawed nature of the Application is a matter which must be dealt with at the preliminary stage of the instant proceedings — this is Germany's opinion of course. Germany has drawn the attention of the Applicant time and again to the lack of substantiation of its claims. None of the opportunities open for remedying the defect was used, however. Yesterday, it was the same song as from the very first moment of this proceeding. Germany cannot but state again its firm conviction that an application drafted in such a cavalier fashion is not a remedy suitable for being dealt with as to its merits.

17. The International Court of Justice is an institution of the entire international community. Its resources are a scarce commodity. Any applicant bears therefore a certain responsibility. Claims based on utterly flimsy foundations should not be accepted by this Court for an examination as to their merits. Liechtenstein has been given a fair chance to substantiate its allegations against Germany. But it has failed to do so and thus to meet its responsibility as a Member of the United Nations. I shall now deal with the sixth Preliminary Objection.

E. Non-épuisement des recours internes

Monsieur le président, Madame et Messieurs les juges,

1. J'aimerais en quelques mots parler de la dernière des exceptions préliminaires soulevées par l'Allemagne, du non-épuisement des recours internes, pour répondre notamment aux arguments avancés par le professeur Hafner.

2. Il est vrai que dans le contentieux international on distingue entre les hypothèses où l'Etat a été lésé directement dans ses droits et les autres hypothèses où un Etat a été lésé dans la personne de ses ressortissants. L'Allemagne ne conteste point cette distinction, qui est fermement ancrée dans la jurisprudence de cette Cour. Pourtant, comme il a été montré par mes collègues et par moi-même au cours de ma plaidoirie précédente en langue anglaise, on ne perçoit nulle part quelque ingérence directe que ce soit dans les droits souverains du Liechtenstein comme Etat. Les allégations à cet effet sont dénuées même d'un commencement de plausibilité. Je m'abstiendrai de m'étendre sur ce sujet.

3. Il est également vrai que personne ne peut être dans l'obligation de s'adresser à la justice nationale du pays qui a prétendument violé ses obligations selon les règles du droit des étrangers. A cet égard, nous sommes pleinement d'accord avec le professeur Hafner.

4. Mais le point essentiel est d'une autre nature. Si vraiment dans les années quatre-vingt-dix l'Allemagne avait porté atteinte aux biens dont il est question maintenant, il serait logique que les (anciens) propriétaires — en réalité il s'agit depuis de longues années de biens tchèques selon la législation tchèque — puissent faire usage des recours qui existent en droit allemand. Il a déjà été démontré que le système allemand de la protection de l'individu contre les atteintes de la puissance publique à ses droits est l'un des plus complets au monde. L'Allemagne ne connaît même pas la théorie de l'acte politique. Un recours présenté devant un tribunal doit être tranché par celui-ci en tout état de cause — évidemment, sauf stipulation conventionnelle contraire. Tout refus de statuer équivaudrait à un déni de justice illicite.

5. Or, si l'on demande quel acte aurait pu faire grief aux personnes concernées, les habilitant à introduire un recours, on a beaucoup de peine à identifier un comportement pertinent émanant d'une autorité publique quelconque. En effet, personne ne saurait attaquer rien qu'une opinion juridique qui est répandue chez les autorités gouvernementales ou administratives. Une opinion, aussi longtemps qu'elle ne se manifeste pas dans des actes concrets, ne fait pas grief. Elle ne porte pas atteinte aux droits du particulier. Celui-ci ne se trouve pas dans la nécessité de défendre ses droits. Aussi longtemps que l'Etat qu'il croit être son adversaire n'agit pas, la jouissance de ses droits lui reste acquise.

6. Appliquons ce raisonnement très simple aux anciens biens liechtensteinois sis en République tchèque. Il est patent qu'aucun acte législatif formel n'est intervenu. Les assemblées parlementaires allemandes sont restées absolument inactives. Par ailleurs, il n'existait pour elles aucun motif pour prendre une initiative quelconque. L'affaire des biens liechtensteinois confisqués en Tchécoslovaquie a toujours été une affaire bilatérale entre l'Etat spoliateur et l'Etat victime. Par conséquent, prendre des décisions à cet égard n'a jamais été dans la compétence internationale de l'Allemagne. Si l'Allemagne s'était immiscée dans les rapports difficiles entre tout d'abord la Tchécoslovaquie et le Liechtenstein et plus tard entre ce dernier pays et la République tchèque, on aurait pu lui reprocher d'excéder son champ d'action tel qu'il est délimité par le droit international.

Donc, pas question d'un acte législatif qui éventuellement aurait pu faire l'objet d'un recours constitutionnel. En fait, les règles générales du droit international font partie intégrante du droit allemand interne. On peut donc les invoquer pour motiver un recours constitutionnel.

7. En second lieu, les tribunaux. Il est vrai que les tribunaux sont des institutions dont le comportement peut engager la responsabilité de l'Etat qui les a créés. Tout le monde connaît les règles élaborées par la Commission du droit international qui reflètent la coutume internationale. Mais, ici encore, essayer de dresser un bilan serait une entreprise vaine. Les tribunaux allemands ont bien tranché l'affaire du *Tableau de Pieter van Laer*, mais ils ne sont jamais plus intervenus dans la suite, et ceci non seulement pour des raisons accidentelles. En effet, toute la propriété immobilière pour laquelle le Liechtenstein demande une compensation financière de l'Allemagne se trouve, selon les règles du droit international public ainsi que les règles du droit international procédural, sous la compétence tchèque. Il n'y a aucun lien pertinent qui lierait à l'Allemagne les châteaux et les forêts perdus. Nous le constatons de façon objective, tout en prenant éminemment au sérieux la douleur des anciens propriétaires.

8. Il reste, finalement, le Gouvernement allemand. Et bien, il est vrai que le gouvernement et tous ses services doivent respecter les arrêts de la Cour constitutionnelle. C'est la conséquence logique du principe de *res judicata*. Mais quel est le résultat de l'affaire du *Tableau de Pieter van Laer* ? Il est très simple, il se réduit à la constatation que les tribunaux allemands se trouvent dans l'impossibilité de se prononcer sur des actions en justice dont le but est de contrarier les mesures prises par le Gouvernement tchécoslovaque à la fin de la seconde guerre mondiale contre des citoyens liechtensteinois. Y a-t-il un seul acte qu'on pourrait, en bonne foi, interpréter comme s'arrogeant une compétence quelconque sur les biens concernés ? Il n'y en a pas, et malgré tous les efforts déployés par les conseils du Liechtenstein, en particulier le professeur Hafner, de tels actes ne sont pas apparus. La prétendue position générale de la politique allemande, si éloquemment esquissée par le professeur Crawford (par. 15), n'existe simplement pas. Au contraire, jusqu'à l'heure actuelle le Gouvernement allemand a publiquement manifesté sa conviction que la campagne de confiscation menée en Tchécoslovaquie a enfreint les règles du droit international alors en vigueur.

9. En d'autres termes, où que l'on regarde, un acte susceptible de faire grief aux nationaux liechtensteinois qui ont été dépossédés de leurs biens en 1945 et 1946, et donc attaquable devant les tribunaux allemands, n'est pas visible. C'est la preuve tangible du fait que dans les années quatre-vingt-dix rien ne s'est passé qui pourrait avoir une pertinence quelconque pour la procédure en cours. La seule réalité concrète c'est bien la campagne de confiscation menée par la République tchécoslovaque. En vertu de la législation tchécoslovaque tout d'abord, et maintenant la législation tchèque, les titulaires des biens concernés ont changé. Dans les années quatre-vingt-dix, ces biens n'étaient plus de la propriété liechtensteinoise. Le Liechtenstein a certes un droit à être compensé selon les règles de la responsabilité internationale. Mais c'est bien autre chose que la titularité que les ressortissants liechtensteinois ont perdu il y a longtemps déjà, il y a des décennies.

10. Par conséquent, l'Allemagne maintient sa position que les victimes des spoliations auraient dû présenter leurs objections devant les tribunaux tchécoslovaques en 1945-1946. A cet égard, toutefois, tout a déjà été dit. Nous n'allons pas le répéter.

Mr. President, could you kindly give the floor to Professor Dupuy.

The PRESIDENT: Thank you, Professor Tomuschat. I now give the floor to Professor Dupuy.

M. DUPUY :

F. L'absence à l'instance des Etats successeurs de la Tchécoslovaquie

1. Monsieur le président, Madame et Messieurs les juges, les plaidoiries consacrées hier à la question de la «partie indispensable» par la Principauté du Liechtenstein me permettent aujourd'hui d'être assez bref. Je relèverai d'entrée un point au demeurant assez mineur. La Principauté a semblé s'étonner du fait que l'Allemagne ne mentionne le plus souvent dans ses plaidoiries que l'un des Etats successeurs de la Tchécoslovaquie et pas l'autre. La raison en est simple; c'est que les avoirs appartenant anciennement à des ressortissants du Liechtenstein qui ont fait l'objet d'une expropriation se trouvent, dans leur quasi-totalité, sur le territoire de la République Tchèque et non sur celui de la Slovaquie.

2. Ceci posé, ma tâche est facilitée par le fait que mon ami Alain Pellet ait, au nom de la Principauté, exprimé son accord avec la position allemande concernant le contenu et l'interprétation de la règle dite «de la partie indispensable» à partir des trois arrêts consacrés à cette question par la Cour depuis 1954. Il est donc inutile de revenir sur le droit applicable. L'une et l'autre Partie concourent pour reconnaître, en l'état actuel de la jurisprudence de la Cour, que le précédent de l'*Or monétaire* n'est invocable que si l'intérêt juridique du tiers absent se confond avec l'objet même du différend et si la Cour se trouve, de ce fait, empêchée d'en connaître sans avoir à statuer à titre préalable sur les droits et les obligations du tiers, ce qu'elle ne saurait faire sans son consentement.

3. La différence de position entre les Parties se concentre en réalité sur la question de savoir si de tels critères sont en l'occurrence oui ou non satisfaits. De ce point de vue, les exposés présentés devant vous par la Principauté hier ont permis de voir plus clairement quel est le sens de sa démarche. Ils ont, je dois le dire aussi, confirmé que, pour créer un contentieux, le Liechtenstein est contraint de recourir à divers artifices.

L'un d'entre eux, à vrai dire essentiel, consiste à tenter de jouer avec le temps. Il y aurait, d'une part, le temps de l'arrière plan, le temps du décor ou du fond de scène; et ce temps nous ramènerait à l'immédiat après-guerre, entre 1945 et 1955. Et puis, afin de créer l'illusion d'une action dont vous pourriez connaître, il y aurait un autre temps, beaucoup plus récent, celui-là. Ce second temps serait celui de la création du différend, lequel ne serait intervenu qu'à partir de 1995, à l'occasion de la présentation d'un tableau dans une exposition.

4. De la même manière, la Principauté voudrait bien pouvoir différencier les Allemagnes : celle d'avant 1995, qui aurait scellé un accord sinon fait des promesses à la Principauté; et puis celle d'après, qui, oublieuse de ses engagements passés, s'alignerait désormais sur les positions d'une puissance tierce, la Tchécoslovaquie entre temps coupée en deux, pour requalifier les biens expropriés des ressortissants de la Principauté en «biens allemands».

5. Enfin, nouveau sortilège, il n'y aurait aucun lien entre la mise en œuvre des décrets pris après la guerre par la Tchécoslovaquie et les reniements tardifs que le Liechtenstein s'efforce de fabriquer pour mieux les attribuer à la République fédérale d'Allemagne. Dès lors, la Cour pourrait fort bien connaître des faits qu'elle impute à l'Allemagne sans avoir à considérer les décrets pris

par la Tchécoslovaquie ! Le tiers se trouve ainsi révoqué. Il ne serait nullement indispensable puisqu'il n'est pas concerné. De la sorte, vous pourriez vous déclarer compétents puisque le différend, purement bilatéral, n'existerait qu'entre l'Allemagne et la Principauté.

6. La mise en scène est habile. Seulement c'est une mise en scène. Comme mes amis Jochen Frowein et Christian Tomuschat viennent déjà de vous le montrer, on ne peut pas jouer ainsi avec le temps ni avec l'action. En réalité, il y a cohérence et continuité dans la position de l'Allemagne depuis qu'elle a recouvré la souveraineté parce qu'elle reste, au-delà même de la reconstitution de son unité, liée par des obligations héritées des conventions auxquelles elle a souscrit pour prix de cette souveraineté. Je vais, quant à moi, me concentrer sur le dernier des trois artifices précédemment rappelés. Celui qui voudrait vous entretenir dans l'idée qu'il n'existe aucun lien entre les décrets Beneš et les agissements imputés à l'Allemagne fédérale.

7. Or, pour défendre cette illusion, il faut vouloir ignorer le régime des réparations imposées à l'Allemagne après guerre.

Monsieur le président, vous vous souviendrez que j'avais relevé lundi dernier l'insistance paradoxale avec laquelle le Liechtenstein affirmait à la fois que cette affaire n'a rien à voir avec les décrets Beneš, mais s'y référait lui-même si fréquemment dans ses écritures. En réalité, s'il n'a pu lui-même éviter de s'y référer, c'est parce qu'il existe, historiquement et juridiquement, un lien direct entre les décrets et pour la citer sans son titre exact, la Convention sur le Règlement de Questions issues de la Guerre et de l'Occupation, dans son texte amendé tel qu'il fut signé à Paris le 23 octobre 1954, entrée en vigueur en 1955, ce qui explique d'ailleurs qu'on s'y réfère alternativement comme la convention de 1954 ou de celle de 1955 selon que l'on choisit l'une ou l'autre date.

8. L'Allemagne, en 1995, en 1998 ou en 2004, n'a pas davantage qu'en 1954 ou 1955 la faculté de qualifier, au regard du régime de la convention précitée, ce qui devrait être considéré comme «bien allemand» au lendemain de la guerre et ce qui ne le pouvait pas. L'Allemagne n'a pas cette faculté. Pourquoi ? Parce qu'elle y a renoncé par traité.

9. Le professeur Frowein vous a cité plus tôt ce matin le texte de l'article 3, paragraphe 1, de la Convention de Paris de 1955 sur le règlement des questions issues de la guerre et de l'occupation. Je ne le referai donc pas, mais je vous invite respectueusement à vous souvenir de sa

formulation. Il établit à la charge de l'Allemagne une renonciation : l'Allemagne s'engage à ne pas soulever d'objections contre les mesures qui ont été prises ... : «à l'égard des avoirs allemands à l'étranger ou des autres biens saisis au titre des réparations ou des restitutions, ou en raison de l'état de guerre».

10. Or, tous les commentateurs, qu'ils soient juristes ou historiens, sont d'accord là-dessus, cette disposition avait pour objet sinon forcément de légitimer du moins de placer hors d'atteinte ou de remise en cause les expropriations ou les démontages d'installations industrielles déjà opérés par les puissances alliées après la guerre en application de leurs lois internes[3].

L'article 3, paragraphe 1, de la convention de 1955 avait, en d'autres termes, pour objet de *consolider* les mesures d'expropriation ayant déjà frappé les biens considérés comme biens allemands à l'étranger en privant l'Allemagne du pouvoir de le contester.

Or, parmi ces expropriations, il y avait bien celles opérées en application des décrets Beneš, lesquels ne pouvaient être interprétés, en particulier quant à la qualification des biens entrant dans la catégorie de «biens allemands» que par les organes administratifs et judiciaires *tchécoslovaques*, en application de la législation *tchécoslovaque*.

11. La continuité ainsi opérée, dans l'établissement du régime des réparations, entre les décrets Beneš et la Convention de Paris se trouve en particulier avérée par une sorte de chaînons intermédiaires constitués par la loi n° 63 adoptée le 31 août 1951 par le Conseil de la Haute Commission alliée précisant le statut des avoirs allemands à l'étranger[4]. Cette législation fut notamment reconnue priver les juridictions de la République fédérale de toute compétence pour recevoir les réclamations relatives à ces liquidations étrangères par la Cour fédérale d'Allemagne ou BGH, en 1956, — bien avant 1995 — non sans rappeler qu'il appartenait au droit de l'Etat créancier de déterminer le caractère ennemi des biens allemands ou de ceux qui devaient être considérés comme tels[5].

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[3] Pierre d'Argent, «Les réparations de guerre en droit international public – La responsabilité internationale des Etats à l'épreuve de la guerre», *LGDJ/Bruylant*, 2002, p. 161 et suiv., notamment, p. 175-177; Andrea Gattini, «Le riparazioni di guerra nel diritto internazionale», *CEDAM*, 2003, p. 308 et suiv.

[4] *Journal officiel de la Haute Commission Alliée en Allemagne*, 5 septembre 1951, n° 64, p. 1107 et suiv. Cité par Pierre d'Argent, «Les réparations du guerre en droit international public – La responsabilité internationale des Etats à l'épreuve de la guerre», *LGDJ/Bruylant*, 2002, p. 174.

[5] Bundesgerichtshof (BGH), 13.12.1956, *AKU* case, 23 *ILR* 23. Voir F.A. Mann, Zum «Privatrecht der deutscher Reparationsleistung», *Tübingen*, 1962, p. 53 et suiv.

12. Le Landgericht de Cologne n'a pas dit autre chose en 1995. Il a lui aussi rappelé que, sur la base du régime du règlement, c'était la Tchécoslovaquie, s'appuyant sur les décrets Beneš, et non l'Allemagne qui avait la maîtrise de la qualification des biens considérés comme allemands. Il l'a fait en s'appuyant sur le précédent de la Cour fédérale que je viens de citer, laquelle avait déclaré et je la cite dans la traduction française :

> «Le paragraphe 1 de l'article 3 du chapitre sixième de la convention sur le règlement concerne les mesures dirigées contre des avoirs allemands tels que ceux-ci sont définis dans la législation adoptée par l'Etat expropriant vis-à-vis de ses ennemis. Seul cet Etat — celui qui a opéré la confiscation — peut répondre à la question de savoir si, aux termes de cette législation, les avoirs confisqués sont allemands ou étrangers.»

Vous trouverez le texte de l'arrêt du Landgericht et de la citation qu'il fait de l'arrêt de la Cour fédérale à l'annexe 28 au mémoire du Liechtenstein[6].

13. Ainsi ne peut-on, si l'on veut respecter la réalité, séparer les législations nationales en fonction desquelles avaient été opérées des confiscations de biens allemands ou considérés comme tels à l'étranger de leur consolidation postérieure, telle qu'elle résultait de la loi prise par la Haute Commission Alliée puis de la convention de 1952 révisée en 1954 et entrée en vigueur en 1955, dite aussi *Überleitungsvertrag*.

14. Alors, Monsieur le président, Madame et Messieurs les juges, si je vous ai donné ces quelques précisions, ce n'est pas pour anticiper sur le fond. C'est, tout au contraire, pour que vous puissiez, *in limine litis*, et précisément pour éviter de céder au chant des sirènes de la Principauté, constater qu'il n'est pas possible de mettre les décrets Beneš au placard en remettant à plus tard la question de savoir si vous pourrez statuer sur la demande du Liechtenstein sans vous préoccuper de la légalité de ces décrets, alors qu'ils sont en réalité le premier maillon d'une chaîne normative que l'on ne saurait arbitrairement sectionner.

15. Si je vous ai rappelé le contexte juridique dans lequel se situe la question de la qualification des biens considérés comme allemands et ceux qui ne le sont pas, c'est parce que l'habileté de la Principauté dans ses plaidoiries d'hier a précisément consisté à vouloir vous faire croire que l'on pourrait dissocier, temporellement et juridiquement, les décrets Beneš et l'attitude de l'Allemagne. Comme si les premiers restaient sans aucun lien déterminant avec la conduite de

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[6] Annexes au mémoire du Liechtenstein, vol. II, annexe 28, p. 6 et 7.

la seconde ! Comme si l'Allemagne aurait soudainement changé de position, alors qu'en réalité, elle était pieds et poings liés, depuis la convention de Paris de 1955, par une disposition l'empêchant de contester la légalité de mesures d'expropriations prises en application de législations internes étrangères, en l'occurrence, tchécoslovaques; et prises à l'égard de biens dont l'Allemagne, en elle-même, n'a aucune maîtrise de qualification. Par conséquent, bien entendu, l'Allemagne n'a pas «endossé» — pour reprendre les termes du conseil de la Principauté hier — le fait internationalement illicite commis en 1945 par la Tchécoslovaquie. Elle n'a rien pu dire à cet égard, parce qu'elle ne le pouvait pas; et, de fait, l'article 11 du projet de la Commission du droit international sur la responsabilité n'a vraiment rien à voir là dedans.

16. De la même manière, on vous disait hier que «les tribunaux allemands n'ont pas estimé devoir se prononcer sur la validité des décrets tchécoslovaques»[7]. On aurait bien tort de s'en étonner. S'ils ne l'ont pas soulevé, cette validité, ce n'est pas parce qu'ils ne le voulaient pas, mais parce qu'ils ne le pouvaient pas ! Et parce que cette incapacité juridique résultait des engagements internationaux de l'Allemagne, lesquels entendaient précisément sauvegarder les mesures d'expropriations accomplies en application de lois internes étrangères. Nuance importante, vous en conviendrez !

Il serait par conséquent pour le moins erroné de voir dans cette abstention des tribunaux allemands une démonstration de l'indépendance de la législation nationale tchécoslovaque (c'est-à-dire des décrets Beneš) à l'égard du comportement de l'Allemagne par l'intermédiaire de ses organes judiciaires !

17. Monsieur le président, Madame et Messieurs les juges, la réalité est qu'il y a un lien direct, une continuité normative entre les décrets expropriant les biens que la Tchécoslovaquie considérait comme allemands dans l'immédiat après-guerre et la *constance* du constat opéré par les tribunaux allemands quant à l'impossibilité dans laquelle ils se trouvaient et se trouvent encore, même après la réunification, de remettre en cause la légalité internationale de ces décrets.

Monsieur le président, Madame et Messieurs les juges, ce que je viens de vous dire, il fallait que je vous le dise *aujourd'hui*. Et pas demain ou dans six mois ou dans un an ou à Pâques ou à la

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[7] Plaidoirie du professeur A. Pellet, 16 juin 2004, par. 22.

Trinité, lorsque vous examineriez l'affaire au fond. Il fallait que je vous le dise aujourd'hui parce que c'est un préalable indispensable.

C'est, à tous les sens du terme, une question vraiment préjudicielle.

La question à laquelle vous invite à répondre le Liechtenstein vous amènerait à réexaminer le régime du règlement établi par la convention de 1955, lequel consolidait les qualifications et les décisions prises par les législations nationales, en l'occurrence tchécoslovaques. Dès lors, vous ne pourriez séparer celles-ci de celles-là. Et, contrairement, aux juridictions allemandes, qui ne le peuvent pas, vous seriez confrontés à la question de la légalité de cette législation nationale ordonnant l'expropriation de ce qu'elle considère comme «biens allemands». Cette législation est tchécoslovaque; elle n'est pas allemande. Et la République tchèque, je le constate à nouveau, n'est pas dans cette salle. Elle est absente et cette absence est la marque non de son désintérêt pour cette affaire mais de son désaveu de votre compétence.

Monsieur le président, je vous remercie et je vous prie de donner la parole à l'agent de la République fédérale d'Allemagne.

The PRESIDENT: Thank you, Professor Dupuy. I now give the floor to Mr. Läufer, the Agent of the Federal Republic of Germany.

Mr. LÄUFER: Mr. President, distinguished Members of the Court.

G. Submissions

Germany once again reiterates that it unrestrictedly maintains all of the Preliminary Objections it has raised. I will now present the submissions of Germany. May it please the Court. Germany requests the Court to adjudge and declare that:

- it lacks jurisdiction over the claims brought against Germany by the Principality of Liechtenstein, referred to it by the Application of Liechtenstein of 30 May 2001, and that
- the claims brought against Germany by the Principality of Liechtenstein are inadmissible to the extent specified in its Preliminary Objections.

This brings to a close Germany's pleading in the case concerning *Certain Property (Liechtenstein* v. *Germany)*. I thank the Court for its kind attention and its patience in listening to our oral argument.

The PRESIDENT: Thank you, Mr. Läufer. The Court takes note of the final submissions which you have now read on behalf of the Federal Republic of Germany.

The Court will meet again tomorrow from 10 to 11.30 a.m. to hear the second round of oral argument of the Principality of Liechtenstein.

The sitting is closed.

The Court rose at 11.30 a.m.

CR 2004/27

YEAR 2004

Public sitting

held on Friday 18 June 2004, at 10 a.m., at the Peace Palace,

President Shi presiding,

***in the case concerning* Certain Property (Liechtenstein *v.* Germany)**

ANNÉE 2004

Audience publique

tenue le vendredi 18 juin 2004, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***en l'affaire relative à* Certains biens (Liechtenstein c. Allemagne)**

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Tomka
	Judges *ad hoc*	Fleischhauer
		Sir Franklin Berman
	Registrar	Couvreur

The Government of the Federal Republic of Germany is represented by:

Mr. Thomas Läufer, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Edmund Duckwitz, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Jochen Frowein, Director emeritus of the Max-Planck-Institute for Comparative Public Law and International Law Heidelberg, Professor of Public International Law, University of Heidelberg,

Mr. Christian Tomuschat, Professor of Public International Law, Humboldt-University of Berlin,

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and the European University Institute of Florence,

as Counsel;

Mr. Daniel Erasmus Khan, Privatdozent, Visiting Professor at the University Bayreuth,

Mr. Andreas Paulus, University of Munich,

Ms Karin Oellers-Frahm, Max-Planck-Institute for Comparative Public Law and International Law Heidelberg,

Ms Susanne Wasum-Rainer, Head of the Public International Law Division, Federal Foreign Office,

Mr. Reinhard Hassenpflug, Federal Foreign Office,

Mr. Götz Reimann, Embassy of the Federal Republic of Germany,

as Advisers;

Ms Fiona Sneddon,

as Assistant.

The Government of the Principality of Liechtenstein is represented by:

H.E. Mr. Alexander Goepfert, Freshfields Bruckhaus Deringer, Düsseldorf, Special Commissioner of the Principality of Liechtenstein,

as Agent;

H.E. Mr. Roland Marxer, Ambassador, Director of the Office for Foreign Affairs of the Principality of Liechtenstein

as Advocate;

Mr. Dieter Blumenwitz, Professor of Public International Law, University of Würzburg and Munich,

Mr. Thomas Bruha, Professor of Public Law, University of Hamburg,

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Gerhard Hafner, Professor of Public International Law, University of Vienna, Associate Member of the Institute of International Law,

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, member and former Chairman of the International Law Commission,

as Counsel and Advocates;

Mr. Malcolm Forster, Professor of International Law, University College, London, Freshfields Bruckhaus Deringer, London,

Ms Juliane Hilf, member of the Chamber of Lawyers of Germany, Freshfields Bruckhaus Deringer, Cologne,

Ms Lucy Reed, member of the State Bar of New York, Freshfields Bruckhaus Deringer, New York,

as Advocates;

Mr. Daniel Müller, Temporary Lecturer and Research Assistant at the University of Paris X-Nanterre,

Mr. Stephan Wittich, Assistant Professor at the University of Vienna,

as Advisers;

Ms Nadine Heider, Freshfields Bruckhaus Deringer, Cologne,

Ms Gabriele Klein, Freshfields Bruckhaus Deringer, Düsseldorf,

as Assistants;

Mr. Thomas Dillmann, ECC Kohtes Klewes,

Mr. Thomas Pütz, ECC Kohtes Klewes,

as Information Officers.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the second round or oral argument of the Principality of Liechtenstein and, thus, I shall now give the floor to Professor Crawford.

Mr. CRAWFORD:

1. Liechtenstein's reply on Germany's Preliminary Objections 1-3

1. Mr. President, Members of the Court, abstinence and advocacy both start with the letter "a" and they are in Volume 1 of the *Longer Oxford English Dictionary*. They have nothing else in common with each other. However, Liechtenstein does take seriously your injunction, Mr. President, on Wednesday to say no more in our reply than is necessary[1]. So on this occasion I will try to combine abstinence and advocacy. We listened carefully to what our distinguished opponents said yesterday. I hope they will not take it as any lack of politeness or respect that we will, this morning, be very brief. Even Professor Pellet will be brief, and I can be briefer still in dealing with Preliminary Objections 1 to 3.

2. Before turning to these, I note the distinguished Agent's comment, in the first paragraph of his introduction yesterday, that all Germany seeks at this phase is a decision on the six Preliminary Objections[2]. Unfortunately, he followed that up in exactly the next paragraph with the statement that "reparation claims against Germany have no legal basis whatsoever. The question of reparations is obsolete."[3] I hope this was not an attempt to introduce, unpleaded, a seventh preliminary objection — of mootness. In its context it looked more like an anticipatory merits argument — another anticipatory merits argument —, and indeed the obsolescence of a treaty or of an obligation would be a matter of merits and not a matter of preliminary objection.

3. But anyway I would only observe that Mr. Läufer's assertion is inconsistent with the United States renunciation in the United States-German Agreement of 2000, to which we referred

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[1] CR 2004/25, pp. 64-65 (President Shi).

[2] CR 2004/26, p. 8, para. 1 (Mr. Läufer).

[3] CR 2004/26, p. 8, para. 2 (Mr. Läufer).

on Wednesday[4] and which yesterday Germany decided not to mention. Nor did it mention the German-Czech Declaration of 1997, which is in the pleadings[5], or much other material that could have been put in the pleadings at this stage had the issue been properly raised. So we will take the Agent at his word and confine ourselves to the six Preliminary Objections that Germany has actually made and formally pleaded.

Preliminary Objection 1: there is a dispute

4. The first Preliminary Objection is Germany's allegation that there is no legal dispute before the Court. I hope I am not reading too much into the speech of the distinguished Agent of Germany yesterday when I say that that Objection seems to have disappeared. He said only, and mildly, that "an amicable discussion of divergent legal opinions should not be equated with the existence of a dispute in the sense of this Court's Statute before it reaches a certain threshold"[6]. Put in the abstract that is fair enough. But of course we are not dealing in the abstract. There was a concrete issue under discussion; the two rounds of consultations may have been amicable but they were not academic. Mr. Läufer did not say why this matter has not reached the not very high threshold defined in your case law, and clearly enough it has, as I showed on Wednesday[7].

Preliminary Objection 2: the dispute relates to situations or facts since 1980

5. I turn to the second Preliminary Objection, which was discussed further by my friend, Professor Frowein yesterday. Here there is still an issue between the Parties, since Professor Frowein, while not, as I read it, disagreeing with my analysis of the case law, disagreed with my application of it to this case. Quite honestly, Mr. President, Members of the Court, I think that between us we have set out the relevant considerations in this regard and that it is for you to decide. In particular it is for you to decide as between our respective interpretations of the *Right of Passage* case[8]. I would only say that I cannot understand how, on Professor Frowein's

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[4] CR 2004/25, p. 14, para. 15 (Mr. Goepfert).

[5] ML, Ann. 37.

[6] CR 2004/26, p. 10, para. 8 (Mr. Läufer).

[7] CR 2004/25, pp. 19-23, paras. 13-21 (Professor Crawford).

[8] *I.C.J. Reports 1960*, p. 25. Compare CR 2004/26, p. 15, para. 20 (Professor Frowein) and CR 2004/25, pp. 26-27, paras. 30-31 (Professor Crawford).

interpretation, the relevant fact or situation concerning the dispute as to the *existence* of the right of passage, which was disputed, could only have arisen in 1955: I simply cannot understand it. In that case, as here, there was no significant gap in time between the triggering fact or situation and the dispute which arose immediately upon the fact or situation which triggered it. The dispute *pointed* to the fact or situation, and did so forthwith.

6. In short, we say that the temporal limitation refers to the generating fact, the *fait générateur*, which triggers the dispute. Professor Frowein accepts the terminology but puts the *fait générateur* of this dispute much earlier — I think now it is not 1945 but 1955, the date of the entry into force of the Settlement Convention. So there is no way it can be awake for another ten years but still asleep for a long time. Frankly, to date it from 1955 is eccentric. The Settlement Convention, with its reference to "German external assets", created no dispute with neutral Liechtenstein. That Convention was never before applied to neutral assets, despite Germany's insistence now to the contrary. Imagine the three victorious Allies — three of the four major Allies: those three have now apparently become the, by my count, fourth, fifth and sixth indispensable parties to this case[9]) — being told by Liechtenstein in 1955 that the Settlement Convention breached its rights as a neutral State. What an absurdity, they would have said — it deals with Germany, not with neutrals such as Liechtenstein. So much for the Settlement Convention as the triggering dispute, the *fait générateur*! We must revert to the obvious fact or situation, Germany's decisions in the years from 1995 onwards, which were the origin and are at the heart of this now admitted dispute.

Preliminary Objection 3: the dispute is not within Germany's domestic jurisdiction

7. Mr. President, Members of the Court, Germany's shift from the Beneš Decrees to the Settlement Convention — one of the shifts they made yesterday — creates serious problems for the third Preliminary Objection, that concerning domestic jurisdiction. Because the thrust of Germany's argument seems now to be that it had no choice in the matter because of the Settlement Convention — the Settlement Convention in effect disposed of the question. The three Powers

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[9] CR 2004/26, p. 10, para. 7 (Mr. Läufer).

forced it to sign, as the price of its post-war independence. Germany was "commanded", said Professor Tomuschat, and thereafter it had no choice[10].

8. Well, whether you find that defence plausible or not, it is totally inconsistent with a claim of domestic jurisdiction. As Professor Blumenwitz showed on Wednesday, the plea of domestic jurisdiction is *definitively* removed once it is shown that an international law title is *provisionally* relevant to a claim[11]. How much more is it excluded when the title is invoked by the Respondent itself, the very State which raises the preliminary objection. A litigant simply cannot say, in the same breath, or in the same phase of a case — this was a matter of domestic jurisdiction, *and* we were required to do it by a treaty. To invoke a treaty as a defence is to admit its relevance. The one argument excludes the other.

9. While I am on the Settlement Convention, I should make two further points in response to statements made yesterday.

10. First, Germany's presentation seemed aimed at creating the impression that Liechtenstein is focusing narrowly on the term "reparation" in Chapter 6, Article 3, paragraph 1, of the Settlement Convention, and not on the phrase "as a result of the state of war"[12]. First of all, of course, the qualifying phrase "German external assets" applies to all parts of Article 3, paragraph 1. But in any event Liechtenstein has dealt throughout with Article 3, paragraph 1, as a whole. We included the full language in our Application and Memorial, and we have consistently referred to the phrase in full[13]. Moreover it is clear that the term "state of war" in the Settlement Convention is used to refer to a relationship with Germany, a relationship in which the rules of peace were suspended. They were never suspended with Liechtenstein. Paragraph 3 *(c)* specifically refers to neutral States, and here the reference is to German property in neutral territory, not to neutral property in Allied territory, such as that of Czechoslovakia.

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[10] CR 2004/26, p. 22, para. 10 (Professor Tomuschat).

[11] CR 2004/25, p. 22, para. 10 (Professor Blumenwitz), citing *Nationality Decrees Issued in Tunis and Morocco, 1923, P.C.I.J., Series B, No 4*, p. 26.

[12] CR 2004/26, p. 22, para. 10 (Professor Tomuschat). See also *ibid.*, p. 9, para. 5 (Mr. Läufer); *ibid.*, p. 12, para. 7 (Professor Frowein).

[13] Application, para. 17; ML p. 8, para. 3; p. 54, para. 3.2.

11. Secondly, we have shown in our pleadings how the best German authorities — I say this with great respect — support a reasonable interpretation of the Settlement Convention, and not the omnibus excuse clause that Germany would now have it be. As Professor Tomuschat pointed out in the *Heidelberg Journal*, the reference to a "state of war" with Germany must be interpreted systematically in the light of the Convention as a whole, including Article 1 of Chapter IX. He said, and I quote — this is in our translation from the German in the *Heidelberg* journal:

> "the war in the sense of an armed conflict ended by the capitulation of 8 May 1945. Due to the systematic nexus between the individual parts of the Settlement Convention it must be assumed that the same meaning of the term forms the basis of Article 3 of Chapter VI of the Settlement Convention . . . [O]n no account whatsoever can this proviso ['as a result of the state of war'] be considered as a non-objection-clause which is unlimited in time and which would oblige the Federal Republic of Germany to accept as sacrosanct every measure which interferes with property and which may be traced in some way back to World War II."[14]

Incidentally the learned author goes on to express the view that Germany has claims against the Czechoslovak authorities and that the Czechoslovak authorities have claims against Germany. He concludes: "Nobody could at the present time — this was published in 1996 — with any degree of reliability estimate which claims may exceed those of the other party."[15]

12. For present purposes, however, the point is that Germany's second round reliance on the Settlement Convention (albeit an interpretation of that Convention which is eminently controversial, that is plainly a matter of merits, and the one on which counsel for Germany, or counsel and the Agent for Germany, in their various capacities do not even agree), that issue of interpretation in and of itself excludes Germany's reliance on the plea of domestic jurisdiction.

Mr. President, Members of the Court, I have relied on your injunction at the end of the last hearing. Thank you for your attentive though brief hearing. I would now ask you to call on Professor Pellet who will deal with Preliminary Objections 4 to 6.

The PRESIDENT: Thank you very much, Professor Crawford. I now give the floor to Professor Pellet.

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[14] C. Tomuschat, "Die Vertreibung der Sudetendeutschen — Zur Frage des Bestehens von Rechtsansprüchen nach Völkerrecht und deutschem Recht" ["The Expulsion of the German Population from the Sudetenland in 1945 and the Confiscation of its Assets — An Appraisal of the Lawfulness of the Measures Taken at the Time and of the Present Legal Position"], *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 56 (1996), pp. 1-69 at p. 56 (translation by Liechtenstein), cited in OL, Appendix 1, para. A17.

[15] *Ibid.*, p. 68.

M. PELLET: Thank you, Mr. President.

2. Réponse du Liechtenstein aux exceptions préliminaires de l'Allemagne n^{os} 4-6

Monsieur le président, Madame et Messieurs les juges,

1. Je suis en face d'un cruel dilemme : ou bien je respecte les recommandations que vous avez adressées aux Parties à la fin de l'audience de mercredi, Monsieur le président, et je m'en tiens aux points qui les «divisent encore» au stade actuel de l'instance — c'est-à-dire *à celui des exceptions préliminaires* et nous pouvons, sans problème, nous en tenir au temps imparti; ou bien je cède à l'invitation que l'Allemagne nous adresse de discuter l'affaire au fond — comme elle l'a fait elle-même et, dans ce cas, je crains, Monsieur le président, que votre *lapsus* d'hier n'ait été prémonitoire et que nous devions nous réunir jusqu'à 23 h 30 (au moins) — *11.30 p.m.* avez-vous dit ... — car, sur le fond, tout divise les Parties, et très profondément !

2. Mais, nous n'en sommes pas encore là et, à vrai dire, comme nos amis allemands n'ont parlé hier *que* du fond, je pourrais presque m'arrêter là — ce qui irait sans doute au-delà de vos recommandations de concision et de la promesse que vient de faire imprudemment M. Crawford en mon nom... Néanmoins, il m'apparaît sinon indispensable, du moins utile, de montrer, justement, en quoi la Partie allemande n'a, en réalité, parlé *que* du fond de l'affaire. Pour essayer de tenir la promesse du professeur Crawford, je le ferai *brièvement* en ce qui concerne chacune des trois questions qui me sont imparties :

— la prétendue justification insuffisante de la requête;

— la question de l'épuisement des recours internes; et

— l'exception fondée sur la règle des «parties indispensables».

C'est par elle que je commencerai.

I. L'exception allemande fondée sur l'absence de la République tchèque à l'instance

3. Monsieur le président, entre lundi et hier, l'Allemagne a considérablement infléchi son argumentation quant aux raisons qui devraient vous conduire à rejeter la recevabilité de la requête du Liechtenstein au prétexte de l'absence d'un tiers indispensable, la République tchèque. Elle s'appuie maintenant exclusivement sur l'article 3, paragraphe 1, de la convention de 1952, amendée en 1954 (pour faire bref je parlerai de «la convention de 1954») dont il résulterait que les

tribunaux allemands seraient empêchés de se prononcer sur ce qu'il faut entendre par «avoirs allemands» aux termes de cette disposition. La Partie allemande doit, en conséquence, inventer une «chaîne de causalité» passablement «zigzagante» :

— point de départ : la convention de 1954 qui interdit aux tribunaux allemands de connaître des questions de réparations;

— *flashback* : les décrets de 1945 portent sur des questions de réparations; et puis

— retour à la convention mais analysée en 1995, jamais avant : *donc* les tribunaux allemands ne peuvent rien faire au sujet des conséquences découlant des décrets.

4. Tout ceci relève du fond : toute la question que le Liechtenstein pose à la Cour au fond est justement de savoir si l'Allemagne peut, à bon droit, s'abriter derrière la convention de 1954 pour faire entrer les avoirs liechtensteinois dans le champ de l'article 3 — c'est-à-dire, quoi qu'en aie la Partie allemande, dans le régime des réparations. Jusqu'en 1995, l'Allemagne avait dit que non — ou, admettons-le pour les besoins de la discussion, elle n'avait pas pris position à cet égard. Maintenant, elle dit que oui. Pour savoir si elle a raison de le faire, le «zigzag» — le retour à 1945 — n'est pas nécessaire : quelle que soit la portée des décrets Beneš, cette assimilation de biens liechtensteinois à des biens allemands porte atteinte — et une atteinte essentielle — à la souveraineté de la Principauté, dont l'existence même en tant qu'Etat se trouve ainsi niée, et remet en cause sa neutralité.

5. Il est possible que les décrets tchécoslovaques soient, eux aussi, entachés d'illicéité (et, à vrai dire, pour le Liechtenstein, ceci ne fait aucun doute); il est possible qu'ils le soient pour les mêmes raisons, ou pour des raisons différentes; ou en partie pour des raisons similaires et en partie pour des raisons différentes, ce qui est sans doute le cas. Mais vous n'avez pas à vous prononcer sur cela, pas davantage que les juridictions allemandes ne l'ont fait pour adopter la position que le Liechtenstein conteste. Ce n'est pas une question *préalable*, c'est une *autre* question — et, comme je l'ai montré mercredi, une question «plus différente» que ne l'étaient, dans l'affaire de *Nauru*, celles de la responsabilité de l'Australie d'une part et du Royaume-Uni et de la Nouvelle-Zélande

d'autre part[16]. Peut-être la Cour sera-t-elle saisie un jour de cette autre question; elle ne l'est pas aujourd'hui.

6. Encore une fois, la question dont vous *êtes* saisis, Madame et Messieurs les juges, n'est pas de savoir si la *Tchécoslovaquie* a agi conformément ou non au droit international, mais si l'*Allemagne* a pu, à bon droit, prendre à l'égard de propriétés *liechtensteinoises* une position identique à celle qu'elle adopte (sans doute à juste titre) vis-à-vis des biens allemands, auxquels elle les assimile depuis la décision de 1995. Si oui, nous perdrons au fond, si non, nous gagnerons. Mais une chose est sûre : vous n'avez à résoudre aucune question préliminaire — ou «préjudicielle»[17] — pour examiner ce problème, le seul que pose la requête du Liechtenstein.

7. L'Allemagne nous a longuement reprochés de vouloir «mettre au placard»[18] les décrets Beneš. Nous les y gardons en effet, juridiquement parlant : ils sont des faits importants pour comprendre le contexte de l'affaire; mais leur validité n'est pas en cause et ce ne serait que si elle l'était que les Etats successeurs de la Tchécoslovaquie seraient des «parties indispensables». Ce n'est pas le cas.

II. La question de l'épuisement des recours internes

8. Avec votre permission, Monsieur le président, j'en viens maintenant à l'exception que l'Allemagne croit pouvoir tirer du prétendu non-épuisement des recours internes. Ici encore, j'ai peu à ajouter à ce qu'a dit le professeur Hafner avant-hier[19], et pour les mêmes raisons : le professeur Tomuschat, a, commis la même confusion que son collègue Dupuy entre ce qui est préliminaire et ce qui relève du fond. Mais d'abord une remarque.

9. Il me semble que cette exception est biaisée dans ses prémisses mêmes : l'affaire que le Liechtenstein a soumise à la Cour trouve son origine dans un recours interne qui n'a pas abouti et dont il résulte un véritable déni de justice malgré l'excellence du «système allemand de protection des individus contre les atteintes de la puissance publique à ses droits», dont se targue

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[16] CR 2004/25, p. 58, par. 24.

[17] CR 2004/26, p. 33, par. 17 (M. Dupuy).

[18] CR 2004/26, p. 31, par. 14 (M. Dupuy).

[19] CR 2004/25, p. 42-49, par. 1-26.

— globalement à très juste titre — le professeur Tomuschat[20]. Ce système n'en est pas moins en défaut dans le cadre précis qui nous intéresse : un déni de justice, «motivé», si l'on peut dire, par l'application — erronée — d'une disposition d'une convention à laquelle le Liechtenstein n'est pas partie, a, bel et bien, été commis.

10. C'est parce que le prince du Liechtenstein, agissant en sa capacité de personne privée, s'est heurté à un «non» (un *nein* ...) catégorique de la part de toutes les juridictions allemandes qu'il pouvait saisir (et qu'il a effectivement saisies), que le Liechtenstein a formé une requête devant votre haute juridiction. Contrairement à ce que prétend l'Allemagne, c'est donc *parce que* les voies de recours ont été épuisées que nous sommes ici aujourd'hui. Et elles l'ont été par le ressortissant du Liechtenstein le plus gravement touché (et susceptible de l'être à l'avenir) par la nouvelle position allemande, car ce sont ses biens propres qui se sont, pour l'essentiel, transformés en dommages de guerre par la volonté de l'Allemagne. Quantitativement, les intérêts des autres ressortissants liechtensteinois, sans être négligeables, sont bien moindres. Assurément, comme mon éminent contradicteur et ami l'a du reste constamment admis[21], on ne peut reprocher au prince Hans Adam II de ne pas avoir épuisé les recours internes dans le cadre de l'affaire du *Tableau de Pieter van Laer* — dont il ne faut tout de même pas oublier que, même si elle ne constitue pas l'essentiel de la requête dont vous êtes saisis, elle en est un élément.

11. Ceci étant, au-delà du cas du tableau, je relève qu'hier, M. Tomuschat a également concédé que, de toutes manières, si le problème était à nouveau soumis à une juridiction allemande, elle déciderait dans le même sens[22] : elle s'abriterait à nouveau derrière la convention de 1954; elle tiendrait à nouveau les biens liechtensteinois en cause pour des avoirs allemands; elle commettrait à nouveau le même déni de justice et porterait à nouveau la même atteinte aux droits du Liechtenstein, non seulement au «droit qu'il a de faire respecter, en la personne de ses ressortissants, le droit international»[23], mais aussi, à ses droits propres d'Etat souverain et qui entend préserver sa neutralité.

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[20] CR 2004/26, p. 25, par. 4.

[21] CR 2004/24, p. 39, par. 109, p. 58, par. 148 ou CR 2004/26, p. 26, par. 7.

[22] CR 2004/26, p. 22, par. 11; voir aussi p. 26, par. 8.

[23] Arrêt du 30 août 1924, *Concessions Mavrommatis en Palestine, C.P.J.I. série A n° 2*, p. 12.

12. Ceci a deux conséquences, Monsieur le président. En premier lieu, il n'y a pas lieu d'épuiser d'autres recours internes : de telles affaires n'offriraient «aucune possibilité raisonnable d'obtenir une mesure de réparation efficace», pour reprendre les termes de l'article 16 *a)* du projet d'articles récemment adopté en première lecture par la Commission du droit international sur les «Exceptions à la règle de l'épuisement des recours internes»[24]. En second lieu, et de toutes manières, cette règle, si elle trouvait à s'appliquer, ne concernerait que la question des réparations dues pour les dommages subis par les nationaux du Liechtenstein à l'exception de ceux subis directement — ou plus exactement «immédiatement» — par l'Etat lui-même. Or ces derniers — les dommages immédiats — sont prédominants, comme l'a montré mercredi mon ami Gerhard Hafner[25]. Dans une telle hypothèse, les recours internes ne doivent pas être épuisés, même s'agissant des réclamations individuelles[26].

13. Certes, les citoyens d'un Etat sont intéressés au respect de la souveraineté et de la neutralité de leur pays. Il n'en reste pas moins que c'est à celui-ci qu'il appartient de les faire respecter. Par les décisions judiciaires sur l'affaire du tableau, décisions endossées (sans aucune restriction) par l'exécutif et, en particulier, par la diplomatie allemande dans les discussions avec les autorités liechtensteinoises, l'Allemagne assimile les propriétés des ressortissants du Liechtenstein à des «avoirs allemands»; ce sont bien les droits souverains de l'Etat qui sont en cause. Et ce sont ceux-ci que la Principauté vous demande, d'abord et avant tout, Madame et Messieurs de la Cour, de faire respecter.

14. Ce faisant — je ne peux pas m'empêcher d'y revenir ! — vous n'avez pas à, et vous ne devez pas, vous prononcer sur «la campagne de confiscation menée par la République tchécoslovaque» comme le prétend M. Tomuschat[27]. Seuls sont en cause les droits du Liechtenstein à l'égard de l'Allemagne.

15. J'ajoute que je trouve un grand intérêt à la remarque de ce même conseil de l'Allemagne : à la fin de sa plaidoirie d'hier, il concède que «[l]e Liechtenstein a certes un droit à

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[24] Projet d'articles de la Commission du droit international sur la protection diplomatique, doc. A/CN.4/L.647, 24 mai 2004, p. 6.

[25] CR 2004/25, p. 43-45, par. 6-11.

[26] Article 15 du projet d'articles de la Commission du droit international sur la protection diplomatique, doc. A/CN.4/L.647, 24 mai 2004, p. 6.

[27] CR 2004/26, p. 27, par. 9.

être compensé selon les règles de la responsabilité internationale»[28]. Mais c'est, Madame et Messieurs les juges, très exactement ce qu'il vous demande ! Et il a le droit de l'être pour les dommages qu'ont subis ses ressortissants mais aussi et d'abord pour ceux qu'il a lui-même subis. Et il ne peut faire de doutes que ces préjudice ss'analysent en des dommages moraux (qui revêtent une importance essentielle), mais *aussi*, en des dommages matériels : les biens de ses ressortissants sont dorénavant considérés comme des réparations de guerre, *non susceptibles d'indemnisation*. Et, comme M. l'Ambassadeur Marxer l'a dit l'autre jour en passant[29], mais il ne me paraît pas inutile d'y revenir, la République tchèque n'a pas tardé à en tirer les conséquences : dès 1999, elle a refusé de répondre aux demandes liechtensteinoises relatives aux spoliations de 1945, du fait que ces réclamations «ont déjà été examinées par les juridictions tchèques et *allemandes*, qui ont conclu au rejet des demandes de la partie liechtensteinoise»[30]. En d'autres termes, la nouvelle position allemande réduit à néant les chances que le Liechtenstein pouvait avoir d'obtenir que les successeurs de l'ancienne Tchécoslovaquie reviennent sur leur refus d'indemnisation — alors même que celui-ci n'était pas fondé sur le régime des réparations et ne pouvait l'être : vous avez entendu tout à l'heure par la voix de James Crawford, ce que Christian Tomuschat a écrit à ce sujet à propos des avoirs des Allemands des Sudètes[31]; il n'est pas le seul; et cela peut être transposé, à fortiori, aux biens liechtensteinois.

16. Il va sans dire au demeurant que l'étendue de la responsabilité de l'Allemagne et les formes et le *quantum* de la réparation sont des questions de fond par excellence.

III. La prétendue justification insuffisante de la requête

17. Monsieur le président, dans la première partie de sa plaidoirie d'hier, le professeur Tomuschat a consacré à nouveau de longs développements à la prétendue justification insuffisante de la requête du Liechtenstein[32]. Avec tout le respect que je lui dois — et que je lui

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[28] *Ibid.*

[29] CR 2004/25, p. 10, par. 7.

[30] Déclaration écrite de la République tchèque du 26 mai 1999 concernant la déclaration de la Principauté de Liechtenstein du 25 mai 1999 (EF.DEL/17/99), mémoire du Liechtenstein (ci-après «ML»), annexe 44, p. A495, traduction du Greffe, vol. III, p. 36.

[31] «Die Vertreibung der Sudetendeutschen — Zur Frage des Bestehens von Rechtsansprüchen nach Völkerrecht und deutschem Recht», *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 56, 1996, p. 1-69.

[32] CR 2004/26, p. 19-24, par. 1-17.

porte ! — cette quatrième exception préliminaire de l'Allemagne ne méritait pas tant d'efforts... Comme l'avait fort bien montré mercredi mon collègue et ami, le professeur Bruha[33], la requête répond en tous points aux exigences du Statut et du Règlement — ce que notre contradicteur admet d'emblée[34] — et, si la Partie allemande n'est pas convaincue de son bien-fondé, il lui appartiendra de vous faire partager son sentiment lorsque nous en serons au stade de l'examen au fond.

18. M. Tomuschat se plaint, avec fougue et véhémence, de ce que, de ce côté-ci de la barre, nous employons tous la même formule et insistons sur le fait que l'Allemagne a «inclus les biens liechtensteinois dans le régime des réparations de guerre» et il croit voir dans cette formule une «stratégie concertée» *(a concerted strategy)*. Je rends hommage à sa perspicacité : *c'est* une stratégie concertée ! Mais une stratégie qui, tout simplement, correspond à la réalité : les tribunaux allemands, puis les diplomates allemands au nom du Gouvernement allemand ont ... «inclus les biens liechtensteinois dans les réparations de guerre». «It is as simple as that» dirait James Crawford !

19. Le professeur Tomuschat ne s'avoue, bien sûr, pas battu. «D'accord», nous dit-il en substance, «les tribunaux allemands ont refusé de se prononcer sur la demande du prince de Liechtenstein, mais ils ne pouvaient pas le faire : ils en étaient empêchés par l'article 3 de la convention sur le règlement». Ce ***non possumus*** est d'ailleurs le refrain, l'«incantation delphique»[35], de la Partie allemande puisque avec peu de variations on le retrouve aussi dans la bouche de MM. Läufer[36], Frowein[37] et Dupuy[38]. «Stratégie concertée» assurément — mais stratégie ... comment dirais-je ? ... de demi vérité. Certes, les juridictions allemandes ont refusé de se prononcer sur la demande du prince Hans Adam II en invoquant cette disposition. Mais il faut aussi, il faut surtout, s'interroger sur le sens de celle-ci et sur les implications de ce refus.

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[33] CR 2004/26, p. 36-42, par. 1-18.

[34] *Ibid.*, p. 19, par. 2.

[35] CR 2004/26, p. 21, par. 6 (M. Tomuschat).

[36] CR 2004/26, p. 9, par. 5 (M. Läufer).

[37] CR 2004/26, p. 12, par. 7-8, p. 14, par. 17 (M. Frowein).

[38] CR 2004/26, p. 29-30, par. 8-9, p. 32, par. 15 (M. Dupuy).

20. Le professeur Frowein a certainement eu raison, de relire le paragraphe 1 de cet article 3[39]. Je le fais à mon tour — en le commentant en tant que de besoin — ceci donnera une vision plus complète et, partant, plus exacte, des choses :

- «La République fédérale ne soulèvera, dans l'avenir, aucune objection contre les mesures qui ont été prises ou qui seront prises à l'avenir…» — c'est sur cet engagement que les tribunaux allemands se sont fondés pour rejeter la demande du prince de Liechtenstein relative au tableau de Pieter Van Laer; et c'est cet engagement dont la Principauté conteste l'applicabilité aux avoirs liechtensteinois (où qu'ils se trouvent, d'ailleurs…) car cet engagement ne porte pas, et ne peut pas porter, sur ces avoirs;
- ce ne sont en effet, à l'évidence, pas des «avoirs allemands à l'étranger» : c'est clair; ce sont des avoirs liechtensteinois, pas allemands;
- ce ne sont pas non plus d'«autres biens saisis au titre des réparations ou restitutions»; je l'ai montré avant-hier[40] sans être contredit;
- ils ne peuvent pas avoir été saisis «en raison de l'état de guerre» : il n'y avait pas d'«état de guerre» entre le Liechtenstein, qui était neutre, et la Tchécoslovaquie; et
- l'Allemagne ne peut davantage invoquer un accord entre les trois puissances et un pays neutre : il n'existe pas d'accord de ce genre avec la Principauté.

21. Oh ! bien sûr, Monsieur le président, je pourrais commenter fort longuement chacun de ces points, et le Liechtenstein l'a largement fait dans son mémoire, mais, décidément, nous n'en sommes pas au fond et je ne veux pas «céder au chant des sirènes»[41] allemandes en pré-discutant le fond (même si, je crois, *La petite sirène*, c'est d'Andersen, pas des frères Grimm …). Tout ce qui importe à ce stade et aux fins de la quatrième exception préliminaire de l'Allemagne, c'est que l'Etat demandeur a, plus que suffisamment, montré que sa requête posait de véritables problèmes juridiques dans un différend l'opposant au défendeur, ne fût-ce qu'en ce qui concerne l'interprétation de la convention de 1954, et que la Cour faillirait à la mission que lui impartit l'article 38 de son Statut en refusant de le régler.

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[39] CR 2004/26, p. 12, par. 6.

[40] CR 2004/25, p. 56, par. 19, p. 59, par. 26.

[41] CR 2004/26, p. 31, par. 14 (Dupuy).

22. «Fort bien», nous dit encore M. Tomuschat, «mais les tribunaux allemands se sont bornés à respecter les obligations internationales découlant de l'article 3 de la convention». D'abord, le Liechtenstein n'est lié par cette convention ni en tant que Partie, ni en tant que belligérant — en admettant que cette «qualité», si c'en est une, puisse suffire; peut-être l'article 3 a-t-il été adopté «for the benefit of the victorious Allied Powers, including the former Czechoslovakia»[42], mais sûrement pas à l'avantage du Liechtenstein, qui ne relève pas de cette catégorie de «victorious Allied Powers» et auquel la convention n'est pas opposable. Ensuite (en admettant que l'on applique tout de même la convention), le *non possumus* des tribunaux allemands ne peut s'expliquer que par l'assimilation des avoirs liechtensteinois aux avoirs allemands, ce qu'ils ne sont clairement pas, sauf à avoir de la «nation» ou de la «race» allemandes une conception que l'on veut croire révolue. Le Liechtenstein ne songe pas une minute à accuser l'Allemagne actuelle, qui prouve si constamment son attachement aux principes démocratiques, de la faire sienne. Mais alors, la conclusion s'impose : en faisant application de la convention aux biens liechtensteinois, les tribunaux allemands en ont fait une interprétation erronée et il vous appartient, Madame et Messieurs de la Cour, de le constater car cela n'est pas compatible avec la souveraineté du Liechtenstein ni avec sa neutralité durant la guerre. Voilà qui répond suffisamment aux questions posées *in fine* par notre contradicteur :

> «- First, what is the internationally wrongful act that Germany has allegedly committed?
>
> - Second, what legal principles or rules has Germany allegedly violated?»[43]

23. «Pas si vite», nous dit encore le professeur Tomuschat;

> «j'ai trois autres questions à vous poser : 1) Où est le dommage ? 2) Les tribunaux allemands ont eu une attitude purement «passive» *(pure passivity*[44]*)*; en quoi leur refus de se prononcer sur la requête du prince dans l'affaire du *Tableau* peut elle avoir des effets sur les autres biens des ressortissants du Liechtenstein demeurés en République tchèque ? 3) Comment peut-on porter aujourd'hui atteinte à la neutralité d'un Etat durant la seconde guerre mondiale?».

24. Je vais, pour finir, répondre à ces trois questions, Monsieur le président, même s'il me faut, une fois de plus, souligner que ces réponses relèvent du fond. Je le fais par courtoisie pour la

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[42] CR 2004/26, p. 23, par. 13 (Tomuschat).

[43] *Ibid.*, p. 23, par. 15.

[44] *Ibid.*, p. 23, par. 14.

Partie allemande et pour en finir avec cette accusation, tout de même étonnante, de «justification insuffisante». Mais je le ferai brièvement par courtoisie pour la Cour et pour rester dans la logique des exceptions préliminaires, que nos amis allemands malmènent à l'excès.

25. Première question : «Où est le dommage» ? Honnêtement, la question n'est pas très sérieuse. Nous l'avons dit et redit : l'Allemagne a, très directement, porté atteinte à la souveraineté du Liechtenstein en tenant pour «allemands» les biens de ses ressortissants; du même coup, elle a violé sa neutralité. Ceci suffit amplement à établir que la Principauté a, de ce fait, subi un dommage très grave, au moins moral — et il appartiendra à la Cour de décider comment ce dommage doit être réparé.

26. Mais ce n'est pas tout : le préjudice est également matériel et concret. D'abord, bien sûr, il y a le tableau de van Laer que l'Allemagne n'aurait pas dû considérer comme une réparation de guerre échappant à la compétence de ses tribunaux. Mais le préjudice matériel va très au-delà : comme je l'ai dit tout à l'heure, la République tchèque s'est, d'ores et déjà «emparée» de ce précédent regrettable pour «requalifier», si je puis dire, les confiscations Beneš compromettant ainsi un peu plus les chances d'un règlement avec les Etats successeurs de la Tchécoslovaquie. Et que l'on ne vienne pas me dire que ceci «refait» de ceux-ci des tiers indispensables : ce n'est que la conséquence directe de la nouvelle position prise par l'Allemagne. Aux fins de la présente affaire, ce n'est qu'un fait dont il conviendra, ici encore, de tenir compte lorsque la Cour devra apprécier la forme et le montant de la réparation. De toutes manières, comme le Liechtenstein l'a montré dans son mémoire, du seul fait d'assimiler les biens liechtensteinois à des avoirs allemands aux fins des réparations de guerre, l'Allemagne s'est injustement enrichie[45]. Ce sont là des éléments de réponse suffisants, à ce stade en tout cas, à la deuxième question.

27. Reste la troisième, Monsieur le président : «How could Germany, 50 years after the Second World War, possibly have violated Liechtenstein's rights as a «neutral» State?»[46]. Outre qu'il faut distinguer entre la source et la violation de l'obligation comme l'a rappelé James Crawford tout à l'heure, la réponse est très simple; elle est celle à donner à tous les révisionnismes : c'est parce que, en assimilant les biens liechtensteinois à des avoirs allemands,

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[45] ML, p. 155-161, par. 6.35-6.52.

[46] CR 2004/26, p. 23, par. 14 (M. Tomuschat).

l'Allemagne nie un fait, historique et avéré, qui fait la fierté légitime du Liechtenstein et de son peuple : la Principauté *est* demeurée neutre et libre pendant la guerre, malgré les obstacles, malgré les difficultés. Elle a le droit de s'en prévaloir et que les conséquences en soient tirées, notamment en ce qui concerne le sort des biens de ses ressortissants.

28. L'Allemagne se plaint que nous «chantions toujours la même chanson»[47]. Je ne crois pas qu'elle veuille l'entendre. Il n'est, Monsieur le président, pire sourd que celui qui ne veut pas entendre. Le Liechtenstein est convaincu que la Cour lui prêtera une oreille plus attentive…

Madame et Messieurs les juges, je vous remercie vivement de votre attention et je vous prie, Monsieur le président, de bien vouloir donner la parole à M. Goepfert, agent de la Principauté, pour de brèves conclusions.

The PRESIDENT: Thank you, Professor Pellet. I now give the floor to Mr. Goepfert, Agent of Liechtenstein.

Mr. GOEPFERT:

3. Conclusion and Submissions

1. Mr. President, honourable Members of the Court, it is my task now to conclude the second round on behalf of the Principality of Liechtenstein.

2. A great deal of what you heard yesterday from the German delegation went only to the merits. For my part, I will try not to follow my distinguished German colleagues down this path, as I make my few concluding observations on their interventions of yesterday.

3. One could not help but notice several significant shifts in Germany's position yesterday. The first is relevant to Germany's Preliminary Objections concerning the scope of the dispute and the availability of local remedies. Germany has created the impression that Liechtenstein's case deserves to be dismissed at the Preliminary Objections phase because it is about a single painting. Any lingering doubt about whether Germany genuinely stood behind this argument was resolved yesterday. You heard Professor Tomuschat say it: "To be sure, if tomorrow another painting confiscated in 1945-1946 at the hands of the Czechoslovak authorities were found in Germany and

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[47] *Ibid.*, p. 24, par. 16.

were claimed by the former owner, the same legal position would obtain."[48] This has been Liechtenstein's allegation from the beginning[49], but now you have the confirmation from the State actor involved — the only indispensable State actor — Germany.

4. We also saw a shift of Germany's attention from the Beneš Decrees to the Settlement Convention. In the Preliminary Objections[50], they insisted that "what is in reality at the heart of the present case is the seizure of certain Liechtenstein property under the Beneš Decrees" of Czechoslovakia. As of yesterday, the heart of the dispute was to be found in the Settlement Convention imposed by the Allies, and in particular in the allegedly inalienable abstention provision in Chapter 6, Article 3. It seemed as if Germany were inclined to move the date for its *ratione temporis* objection from 1945 to 1955, identify its necessary, but missing, third party to be the Allies rather than the Czech and Slovak Republics, and reframe its main Preliminary Objections completely.

5. As for Liechtenstein's position, it remains unchanged. It was only in 1995 that Germany for the first time used the abstention provision to treat patently neutral Liechtenstein property as German external assets — that is important — under the Settlement Convention.

6. Germany cannot be right that the Allies required it, as Professor Dupuy said: "pieds et poings liés"[51] — tied hand and foot — to abstain from exercising jurisdiction over disputes concerning even neutral property labelled as confiscated German external assets. It is impossible to accept that the Settlement Convention left not even a crack under the door for common sense and international law. Under both, Germany cannot treat the property of a neutral State and its nationals as reparations, restitution or any form of spoils as a result of a state of war. As Professor Crawford has already mentioned, this position is not sustained even in the German academic literature, including distinguished published work by Professor Tomuschat.

7. Even if we accept, for a moment, for the sake of argument that Germany were somehow right that, against common sense and international law, the Allies did intend Chapter 6, Article 3,

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[48] CR 2004/26, p. 22, para. 11 (Professor Tomuschat).

[49] For example, ML, para. 6.10.

[50] POG, para. 51.

[51] CR 2004/26, p. 32, para. 15 (Professor Dupuy).

of the Settlement Convention to apply even to neutral property classified as confiscated German external assets, the German delegation again yesterday left out a critical companion point. The Allies did not intend such treatment to be, forever after, a gift to Germany. It absolutely must be remembered that Article 5 of the same Chapter 6 imposed the obligation on Germany to compensate the owner of any such confiscated property swept under Chapter 3 as war reparations, restitution or spoils. Article 5 was deleted in the 1990 two-plus-four process, but the international law obligation underlying it remains.

8. Mr. President, Members of the Court, I admit I find myself here rather deep into questions of treaty interpretation and substantive international law, which properly belong in the merits phase. But it is Germany that has prematurely injected these issues into this Preliminary Objections phase, and I trust that the Court will forgive me for succumbing to the temptation of pursuing them a little by way of response.

9. I return to Germany's Preliminary Objections with one final point. My esteemed counterpart, Mr. Läufer, repeated yesterday that "Liechtenstein neither clarifies the facts nor the international legal basis on which it rests its claims"[52]. On the contrary, Liechtenstein's case — measured against the threshold standards for the preliminary objections phase — is straightforward. The basic elements are these:

- First, as from 1995, for the first time, the German courts and then the German Federal Government treated the Liechtenstein property confiscated under Beneš Decrees Nos. 12 and 108 as "German external assets or other property, seized for the purpose of reparation" under Chapter 6, Article 3, of the Settlement Convention. This was irrespective of Liechtenstein's status as a neutral, non-belligerent State. It was also irrespective of the fact that Beneš Decrees Nos. 12 and 108 were enacted for the express purpose of social justice and agricultural land reform.
- Secondly, Czechoslovakia (now the Czech and Slovak Republics) had no role in Germany's 1995 classification of the Liechtenstein property.

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[52] CR 2004/26, p. 2, para. 1 (Mr. Läufer).

— Thirdly, it is a basic principle of international law that neutral property may not be treated as war reparations or as "seized as a result of the state of war".

— Fourthly, whatever other injuries it may have caused, Germany's treatment of Liechtenstein assets as German external assets under the Settlement Convention has caused moral injury to the Principality of Liechtenstein.

— Finally, Germany intends never to pay compensation. Whether it should be required to do so, consequential upon declaratory relief, is self-evidently a matter for another day.

10. Mr. President, honourable Members of the Court, I wish to thank you, on behalf of our entire delegation, for your kind attention. We express our appreciation as well to the Registrar and his assistants and to the interpreters.

Monsieur le président, Madame et Messieurs les Membres de la Cour,

Je vais maintenant lire les conclusions finales de la Principauté de Liechtenstein.

11. Pour les motifs développés dans ses observations écrites et durant la procédure orale, la Principauté de Liechtenstein prie respectueusement la Cour :

a) de dire et juger que la Cour est compétente pour connaître des demandes formulées dans sa requête et que celles-ci sont recevables;

et, en conséquence,

b) de rejeter les exceptions préliminaires de l'Allemagne dans leur intégralité[53].

The PRESIDENT: Thank you, Mr. Goepfert. The Court takes note of the final submissions which you have read on behalf of the Principality of Liechtenstein, as it took note yesterday of the final submissions of the Federal Republic of Germany.

This brings us to the end of this week of hearings devoted to the oral argument of the Parties.

I should like to thank the Agents, counsel and advocates for their statements.

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[53] English translation:

For the reasons exposed in her Written Observations and during the hearings, the Principality of Liechtenstein respectfully submits:

(*a*) that the Court has jurisdiction over the claims presented in the Application of the Principality of Liechtenstein, and that they are admissible; and correspondingly,

(*b*) that the Preliminary Objections of Germany be rejected in their entirety.

In accordance with practice, I shall request both Agents to remain at the Court's disposal to provide any additional information it may require. With this proviso, I now declare closed the oral proceedings in the case concerning *Certain Property (Liechtenstein* v. *Germany)*.

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its judgment.

As the Court has no other business before it today, the sitting is closed.

The Court rose at 11 a.m.

PUBLIC SITTING OF 10 FEBRUARY 2005, AT 3 P.M.

READING OF THE JUDGMENT

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today, pursuant to Article 58 of the Statute, to deliver its Judgment on Preliminary Objections in the case concerning *Certain Property (Liechtenstein* v. *Germany)*.

These proceedings were instituted on 1 June 2001 by the filing in the Registry of an Application by the Principality of Liechtenstein against the Federal Republic of Germany. On 27 June 2002, within the time-limit prescribed in Article 79, paragraph 1, of the Rules of Court, Germany raised preliminary objections relating to the jurisdiction of the Court to entertain the case and to the admissibility of the Application submitted by Liechtenstein. Proceedings on the merits were accordingly suspended.

As is usual, I shall not read the introductory paragraphs of the Judgment, which set out the procedural history of the case and reproduce the submissions of the Parties. Nor shall I read the paragraphs which describe the factual background to the case. I shall also omit or summarize some paragraphs of the Judgment. The full text will of course be available at the close of the sitting. I shall accordingly begin the reading of the Judgment at paragraph 18.

[The President reads paragraphs 18 to 54 of the Judgment[1].]

The PRESIDENT: I shall now call upon the Registrar to read the operative part of the Judgment in French.

[Le Greffier lit le dispositif en français[2].]

The PRESIDENT: Judges KOOIJMANS, ELARABY and OWADA append dissenting opinions to the Judgment of the Court; Judge *ad hoc* FLEISCHHAUER appends a declaration to the Judgment of the Court; Judge *ad hoc* Sir Franklin BERMAN appends a dissenting opinion to the Judgment of the Court.

The text of the Judgment is available from today in typescript. It will also be available shortly on the Court's website. The printed text will be available in the near future.

As the Court has no other business before it, I declare the sitting closed.

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[1] *I.C.J. Report 2005*, pp. 15-27.

[2] *C.I.J. Recueil 2005*, p. 27.

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IMPRIMÉ EN FRANCE
PRINTED IN FRANCE

ISSN 0074-4433
ISBN 978-92-1-071061-9